





My dear
Pamela

John

REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

S. J. VANKOUGHNET,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XLV.

CONTAINING THE CASES DETERMINED
FROM FEBRUARY 2ND, 1880, TO FEBRUARY 19TH, 1881,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN HAWKINS HAGARTY, C. J.
“ “ JOHN DOUGLAS ARMOUR, J.
“ “ MATTHEW CROOKS CAMERON, J.

Attorney-General :
THE HON. OLIVER MOWAT.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

HILARY TERM, 43 VICTORIA, 1880.

(From February 2nd to February 14th.)

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

REGINA V. HART.

Private prosecution at suit of Crown—Costs.

Where an indictment for obstructing a highway had been removed by *certiorari*, at the instance of the private prosecutor, into this Court, and defendant had been acquitted, *Held*, that there was no power to impose payment of costs on such prosecutor.

The Court, however, has power to make payment of costs a condition of any indulgence granted in such a case, such as a postponement of the trial, or a new trial.

THE defendant was indicted at the Assizes held at London on the 9th of October, 1876, for obstructing a highway in the township of Westminster.

This indictment was removed into this Court by *certiorari* at the instance of the prosecutor, and was brought down to trial as a *Nisi Prius* record at the Assizes held on the 28th day of October, 1878.

When the cause was reached in its order the trial was postponed at the instance of the prosecutor until the following day, upon the terms of the prosecutor paying to the defendant the defendant's costs of the day, but no formal order was made thereupon.

Upon the following day the cause was tried, and a verdict of acquittal rendered.

November 19th, 1878. *Becher*, Q. C., moved for and obtained, on the part of the prosecutor, a rule calling upon the defendant to shew cause why a new trial should not be had, which rule was, upon the argument thereof in Hilary Term, 1879, discharged.

At the time judgment was given discharging this rule, the defendant's counsel applied for the costs against the prosecutor, but as there was nothing before the Court to shew who the prosecutor was, or that there was a prosecutor other than the Crown, the Court informed him that he must, if so advised, make a substantive motion to that effect, founded upon affidavit.

May 22nd, 1879. *R. M. Meredith* accordingly moved upon affidavit for and obtained a rule calling upon the prosecutor to shew cause why he should not pay to the defendant his costs of defence, also his costs of the day occasioned by the postponement of the trial, as above stated, and also his costs of shewing cause to the rule for a new trial obtained by him.

November 25th, 1879. *Aylesworth* shewed cause. There is no power to impose costs on a private prosecutor. The Crown neither pays nor takes costs. This is the general rule, and is in force except in so far as modified by statutory enactment. He referred to *Regina v. Jackson*, 40 U. C. R. 290 ; *Regina v. Cooper*, 40 U. C. R. 294.

McCarthy, Q. C., contra. As to the jurisdiction. There is this as to the costs of the day and of the rule, independently of any statute : *Rex v. Bartrum*, 8 East 269 ; *Burn's Justice*, I., 660, last edition. As to the general costs of defence, did the R. S. O. ch. 39, sec. 4, introduce that part of

the practice of the Court of Queen's Bench in England here ? The 16 & 17 Vic. ch. 39, sec. 5 (Imp.), cited in *Chitty's Cr. Pl. & Ev.* 19th ed. 106, says that whenever the *certiorari* is awarded at the instance of the prosecutor, he shall enter into a recognizance to pay the defendant in case of his acquittal his costs subsequent to such removal by *certiorari*. The prosecutor here removed the indictment by *certiorari*, and he thereby subjected himself to the liability to be ordered to pay costs. He also cited R. S. O. ch. 58, secs. 9, 10 ; *Rex v. Heydon*, 1 Wm. Bl. 351 ; *Attorney-General v. Stevens*, 3 Pr. 72 ; *Rex v. Passman et al.*, 1 A. & E. 603 ; *Rex v. Edwards*, Salk. 193.

February 2nd, 1880. ARMOUR, J.—We are all of opinion that this is a case in which we should order the prosecutor to pay the costs, if we have the power to do so.

No authority was shewn on the argument warranting our making such an order, and we have been unable to find any.

An application by a prosecutor for a *certiorari* to remove an indictment, such as the present, was always granted as of course in England without any grounds being stated for it by affidavit or otherwise, until the passing of 5 & 6 Wm. IV. ch. 33 ; and that Act not extending to this country, and there being no similar Act here, the practice here is as it was there before the passing of that Act : See *Rex v. Lewis*, 4 Burr. 2456 ; *Rex v. Eaton*, 2 T. R. 89.

That Act, after reciting that it was expedient to prevent prosecutors of indictments and presentments from vexatiously removing them out of inferior Courts into the Court of King's Bench, provides " that no writ of *certiorari* shall issue from the Court of King's Bench at Westminster for removing into that Court any indictment or presentment from any Court of Session, Assize, Oyer and Terminer, or Gaol Delivery, or any other Court, at the instance of the prosecutor or any other person (except His Majesty's Attorney-General), without motion first made in the Court of King's Bench or before some Judge of that Court, and leave obtained to remove such indictment or presentment,

in the same manner as similar motions may now be made and leave given where such application is made on the part of defendants."

It is to be observed that this Act did not require the prosecutor to enter into any recognizance such as the defendant was required to enter into upon obtaining a *certiorari*: 5 & 6 Wm. & M. ch. 11; 5 & 6 Wm. IV. ch. 33.

But by the Act (Imp.) 16 & 17 Vic. ch. 30, a recognizance by the prosecutor is for the first time required. This Act recites that it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench, and enacts that whenever any such writ of *certiorari* shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognizance conditioned that the prosecutor shall, if the defendant be acquitted, pay to him the costs incurred subsequent to such removal: See *Regina v. Mayor of Manchester*, 7 El. & Bl. 453.

Mr. McCarthy contended that the prosecutor, having procured the *certiorari* to be issued removing the indictment into this Court, made himself subject to the jurisdiction of the Court in such a way that we could order him to pay the costs; but the fact that no authority can be found in support of this contention, and the fact of the legislation above referred to, seem to me conclusive against it.

Jones v. Davies et al., 1 B. & C. 143, was an action of replevin. The cause was entered for trial at the Court of Great Sessions for the county of Cardigan, and on the very day before the trial would in due course have taken place, and after the defendants had incurred the expense of counsel fees and witnesses, the *certiorari* was delivered to the Judges. It had issued without any notice having been given to the defendant's attorney and without any special ground having been laid before the Court. Defendants thereupon moved to quash or supersede the *certiorari quia improvide emanavit*, and that a *procedendo* should issue, and that the plaintiff should pay to the defendants the costs

incurred by them below and the costs of the application, citing authority to shew that a *certiorari* could not without special ground be sued out to remove proceedings from the Great Sessions of Wales. The plaintiff's counsel admitted that the *certiorari* must be set aside, but contended that the Court had no jurisdiction over the costs of the proceedings in the Court below.

Per Curiam : "The Court has acquired a jurisdiction over those costs by the *certiorari*, and the Master may tax them as he does in other cases. Therefore, let the rule be made absolute in the terms in which it is prayed."

The decision in this case would seem to support the defendant's contention, but its authority was much shaken, if not overthrown, in the case of *Rex v. Passman et al.*, 1 Ad. & El. 603 ; *S. C.*, 3 N. & M. 730. At the Middlesex Sessions in December, 1833, a bill was found against the defendants for conspiracy. The defendants gave bail, and notice of trial for the ensuing Sessions on January 16, 1834. They appeared at the Sessions house that day with their counsel and witnesses, but shortly before the sitting of the Court and without any notice to them, the prosecutor lodged a *certiorari* to remove the cause into the King's Bench. The defendants thereupon obtained a rule calling upon the prosecutor to shew cause why he should not pay to them their costs of preparing for trial at the Sessions and of this application, citing *Jones v. Davies*. This rule was, upon argument, discharged.

Lord Denman, C. J., said : "The Court has no power to grant this rule. In *Jones v. Davies* the *certiorari* had been unlawfully sued out ; it is not easy to distinguish whether the Court thought themselves entitled on that account to impose payment of costs upon the prosecutor, or whether they felt justified in doing so for any other reason. But here the prosecutor having done only what he had a right to do, we can no more subject him to the payment of these costs than we could fine, or impose any other punishment upon him. As to the suggestion of quashing the *certiorari*, that would be matter for another motion, to be made upon its own particular grounds."

Littledale, J., said: "The decision in *Jones v. Davies* went upon special grounds. It seems the Court there thought that the proceedings had been improperly removed from the Great Sessions; but it is not a case which I should follow as a precedent. It is difficult to say what power the Court could have over the costs below, although they had power over the *certiorari* itself if it issued improperly."

Taunton, J., said: "I am also of opinion that we cannot grant these costs. When *Jones v. Davies* was decided the practice of removing cases by *certiorari* just before trial was prevalent in the Welsh jurisdictions. It appears by the report of that case that there were at the same time four others in which similar rules had been moved for under similar circumstances; and I believe the Court made the rules absolute out of an exuberance of virtuous indignation at that improper mode of proceeding."

Williams, J., said: "It may be a matter of complaint that a prosecutor should remove proceedings without any proper ground; but he having lawfully removed them, I do not see how we can interfere in the manner proposed."

There is no doubt that upon the application in the present case for a postponement of the trial, the presiding Judge had power to impose for such indulgence the terms of the prosecutor paying costs, and had a formal order been then drawn up and signed by the Judge, it could have been enforced in like manner as *Nisi Prius* orders are enforced; but no order having been drawn up, we cannot deal with these costs here.

When any indulgence is asked by either prosecutor or defendant in any indictment or information for any misdemeanour, the Court from which such indulgence is asked has always the power to impose terms as a condition of granting it: See *Rex v. Doyle*, 1 Esp. 125; *Rex v. Moore*, 2 Str. 946; *Rex v. Ives*, Draper's Rep. 440.

So, in granting a new trial, the Court has the same power over the costs as in a civil suit: *Regina v. Whitehouse*, Dearsley C. C. 1; *Rex v. Ford*, 1 N. & M. 776; *Attorney-General v. Stevens*, 3 Price 72.

So, also, if, in a case like the present, the prosecutor had given notice of trial, and did not proceed to trial, nor countermand such notice in due time, the Court would have power to make him pay the costs of the day, for otherwise the defendants might be harrassed and oppressed with unnecessary expense: See *Rex v. Bartrum*, 8 East 269; *Rex v. Walton*, 4 C. & P. 229; *Rex v. James*, in Temp. Hardw. 159; *Regina v. Hazard*, 2 Jur. 1067; *Rex v. Heydon*, 3 Burr. 1304; *S. C.*, 1 W. Bl. 356, and the cases there cited.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule discharged.

LA VASSAIRE V. HERON ET AL.

Distress clause in mortgage—Seizure of goods of stranger—Abandonment of distress.

By a mortgage, under the Short Forms of Mortgage Act, the interest was made payable on 30th of January in each year, and the mortgage contained a power of distress for arrears of interest. On the 30th January, 1879, two years' interest was overdue, and on 23rd May following the defendants, under power of attorney from the mortgagee, and as his agents, entered upon the mortgaged premises, and distrained the plaintiff's goods for arrears of interest. The plaintiff was tenant of the mortgagor, and had entered after the mortgage. The defendants notified the plaintiff that they had distrained, but they did not remove the goods, or place any one in charge. On the 18th August following the defendants distrained and sold the plaintiff's goods for \$8.75 and costs, being for a half year's interest, ending 30th July, 1879, in addition to the previous seizure and demand.

Held, that the defendants having abandoned the first seizure, could not seize a second time for the same demand.

Held, also, that the half year's interest claimed by the second seizure was not due by the terms of the mortgage, and that the distress was for that reason illegal.

Quære, whether the goods of a stranger could be seized under such a distress clause.

THE declaration contained counts for trespass to realty, and for entering plaintiff's house and carrying away his goods, and for wrongful conversion.

The pleas were :

1. Not Guilty.

2. Not possessed.

3. That the lands were the freehold of the defendant Heley.

4. Leave and license.

5. Not guilty by statute.

At the trial, before Cameron, J., at the Ottawa Fall Assizes, 1879, the plaintiff swore that in June, 1878, he went into possession under the mortgagor, the owner of the premises, one Vickery, who had mortgaged them to one MacCrostie : that he paid him \$5 rent in advance and agreed to pay \$20 per year.

The defendant Heley swore that in April, 1879, the plaintiff promised to be tenant of the mortgagee, and pay his rent to him, but afterwards paid the rent to the mortgagor, whereupon the defendants made the seizure under the mortgage, on 23rd May.

The plaintiff's wife swore that when making the second seizure, on 18th August, defendants used violence and made entry by forcing the latch of the front door of the house, which was fastened. This the defendants denied, and said the plaintiff's wife told them they could enter, and they did so peaceably, merely opening the door.

The goods seized were sold at auction, and for about \$10.

The mortgage was dated 26th May, 1877, and contained a defeazance clause on payment of \$250 at 7 per cent., \$50 of principal, with interest on the whole, being payable on January 30th, 1878, and \$50, with interest, being payable on the same date in each year till the whole should be paid.

The short statutable form was used, and it was provided that on default of payment of interest the principal should become payable, and that on default of payment for one month the mortgagee might enter upon, lease or sell the lands : that the mortgagee might distrain for arrears of interest ; and that until default the mortgagor should have quiet possession of the said lands.

The mortgage was not executed by the mortgagee.

On the 23rd May, 1879, the defendant Heley, as attorney and bailiff of the mortgagee, addressed a letter to the mortgagor that he had that day distrained for two years' arrears of interest, due January 30th, 1878 and 1879, and for other charges, certain goods, naming them; and, further, that he had at the same time under the mortgage entered and taken possession, and forbade her or any one trespassing thereon.

He seized some household furniture belonging to the plaintiff, who was in possession, claiming to be tenant of the mortgagor. These things were left on the premises, no one being in charge and plaintiff being still in possession.

On the 18th August, 1879, Heley sent another notice addressed to plaintiff, as sub-tenant of Vickery, the mortgagor, that he had that day levied on the plaintiff's goods and distrained the same for \$8.75 and costs, in addition to the seizure and demand on the 23rd May last as notified to said mortgagor, the said \$8.75 being for one half year's interest due on said premises for the half-year ending 30th July then last past.

The demand was for one half year's interest, \$8.75 costs of seizure, \$1, advertising, \$1, possession money, 75 cents per day, for removal of goods and commission on sales 2 per cent., of all of which payment was demanded on or before the 25th inst., otherwise the goods and chattels, including those then in the ground, would be sold for the same at the market place in Ottawa city, as previously advertised. At the last time he seized again, and removed the goods.

The learned Judge charged the jury that the mortgagee could not distrain the goods of a stranger, and that the first distress having been abandoned a second distress could not be made for the same demand.

The jury found for the plaintiff, damages \$250.

November, 25, 1879. *Spencer*, for defendants, obtained a rule *nisi* to enter a verdict for the defendants, or for a

new trial, on the law and evidence, in this, that the defendants, as agents for the mortgagee, had a legal right to enter and distrain, for interest in arrear under the mortgage, on the plaintiff's goods; and for misdirection in ruling that the plaintiff's goods were not liable to distress on the premises for the said interest.

During the same term *McMichael*, Q. C., shewed cause.

Spencer, contra, referred to *Royal Canadian Bank v. Kelly*, 19 C. P. 196, 430; 20 C. P. 519; 22 C. P. 279; S. C., 14 U. C. L. J. N. S. 8; *Bac. Abr.* Distress B.; *Hope v. White*, 19 C. P. 485; *Chapman v. Becham*, 3 Q. B. 723; Imp. Stat. 4 Geo. II. ch. 28 sec. 5; *Pinhorn v. Souster*, 8 Ex. 763; *Brown v. Metropolitan Life Assurance Co.*, 1 E. & E. 832; *Woodfall*, L. & T., 11th ed., pp. 375, 396; *Coote on Mortgages* 3rd ed., 323; *Gibbs v. Cruickshank*, L. R. 8 C. P. 454; *Glowses v. Hughes*, L. R. 5 Ex. 160.

February 2, 1880. HAGARTY, C. J.—From the notice put in it would seem that on the 23rd of May Heley professed to enter for the mortgagee, and, if so, any tenancy at will was determined.

We know nothing of any formal proceedings, except by the documents put in by Heley, and can only form an idea of the defence therefrom.

We therefore have the mortgagee professing to enter into possession on that day, and at the same time distraining the goods on the premises as for two years' arrears of interest. There was no pretence of holding the goods on this distress, or of leaving any one in charge, and Heley admits he left them there about two months.

It seems impossible on the evidence to uphold any right to make a second distress under such circumstances. A clearer case of abandonment does not often arise.

Then, in August, Heley, by his notice, (which is all we see,) addresses plaintiff as "sub-tenant of Anne Vickery," and says that he has seized his goods for \$8.75c., a half-year's interest, due on the 30th July. There was no pretence for this. By the mortgage the interest was payable yearly, on

30th of January, and the distress in May was for the two years, up to the 30th of January, 1879, and he puts the demand as for this, \$8.75, and costs.

We do not see how, on the evidence, it is possible to support this seizure in August. We must treat the May seizure as wholly abandoned, and the new demand, professing to be based on the mortgage, was wholly unauthorized thereby.

Putting into his last notice, after stating the actual demand of the \$8.75, the words, "in addition to the seizure and demand on the 23rd May last, as notified to the said Anne Vickery," cannot help the defence.

The first distress was clearly abandoned, the second was apparently for a wholly untenable claim. Heley did not act on any alleged attornment to him by plaintiff or on any fresh tenancy to the mortgagee. He treats plaintiff wholly as in under the mortgagor, and distrains in August under the mortgage clause for arrears of interest, as if a tenancy still existed under the mortgagee.

The learned Judge told the jury he did not think that the mortgagee could distrain the goods of a stranger, and moreover, the distress just made having been abandoned, a second distress could not be made for the same rent.

Defendants' counsel put it wholly on the right to distrain under the mortgage. He also urged that the jury should be told that there was no second distress, but a distress on 23rd May, and that on 18th August was only a continuance of the distress. The Judge certainly could not have so ruled on such evidence. He was not specially asked to submit the question of abandonment to the jury. There was really no evidence whatever to be urged against the fact of abandonment.

It seems to have been generally understood that the decision in appeal, *Royal Canadian Bank v. Kelly*, 22 C. P., had decided the important question as to the right to seize a third person's goods under this mortgage clause; but, as there stated, the judgment of the Court, delivered by Draper, C. J., was mislaid, and the result is not stated. In an article, 14 U. C. L. J., Mr. Leith, who was one of the

counsel in the case, states his recollection, but also his inability to remember how this point was decided.

We do not desire to enter on this large question. The case before us hardly calls for our so doing. It would be most useless to send the case down for another trial, even if we differed from the learned Judge in his ruling on this point, as the defendant could not succeed on any view of the evidence. We must assume that the alleged tenancy under the mortgage was wholly determined by Mr. Heley's notice to the mortgagor of his entrance thereunder.

The subsequent claim for fresh rent, as for arrears of interest not accrued, is wholly inconsistent with what he had previously done.

We think the rule must be discharged.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

SULLIVAN V. THE CORPORATION OF THE TOWN OF BARRIE.

*Municipal Corporations—Defective drainage—R. S. O., ch. 174, sec. 491—
Limitation of action.*

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months: *Held*, bad, as sec. 491 of the Municipal Act, R. S. O., ch. 174, did not apply.

DECLARATION:

First count: That defendants suffered certain drains, &c., which they had constructed for the purpose of carrying away the water on and from the streets, to be choked up, by reason whereof the water overflowed and ran into, against, and upon plaintiff's cellars, houses, &c., adjoining one of said streets, and damaged his houses, goods, &c., and destroyed foundations, &c.

Second count : That defendants maintained certain drains, sewers, ditches, &c., for removing from streets the drainage, and defendants suffered them to be choked up, and the drainage overflowed and ran into plaintiff's houses, cellars, &c., adjoining one of the streets, and destroyed the same, his goods, &c., and foundations, &c.

Third count : That defendants, by constructing and maintaining the drains, ditches, &c., mentioned in the preceding counts, directed, collected, and concentrated the waters into the same, and neglected to keep the same in repair and cleaned out, whereby they became choked up, and the drainage received into the same overflowed and ran with greater violence than it would have done but for such concentration, collection, and direction, upon, into, and against, plaintiff's houses, and damaged and destroyed the same, &c., foundations, &c.

Fourth count : That defendants, by the maintenance of the said drains, sewers, &c., directed, collected, and concentrated waters and drainage into the same, and neglected to keep the same in good repair, whereby they became choked, and the waters overflowed and ran with much greater force than they would have but for such concentration, &c., and carried dirt and filth, &c., into plaintiff's houses, &c., and destroyed his goods, foundations, &c.

Plea.—That the cause of action did not accrue within three months.

Demurrer : That the plea is bad, as the cause of action is not limited to three months.

13th January, 1880. The case was argued before Osler, J., sitting alone, when *Pepler* appeared for the demurrer.

Lount, Q.C., contra.

February 6th, 1880. OSLER, J.—I think the plea is bad. The only section of the Municipal Act, R. S. O., ch. 174, which imposes any limitation as to the time of commencement of an action against a municipal corporation is the 491st, which enacts that, "Every public road,

street, bridge, and highway shall be kept in repair by the corporation, and in default of the corporation so to keep in repair the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default; but the action must be brought within three months after the damages have been sustained."

This section is not applicable to all actions against a corporation, but only to those arising out of non-repair of, or by reason of neglect to repair, public streets, highways, &c. It was argued that the causes of action in the declaration were within the section, because the drains must have been made in, on, or under, the streets, &c., and were, therefore, either part of the streets, or were constructed for the purpose of keeping the streets in repair.

The declaration, in my opinion, however, charges wrongful acts of and breaches of duty by the defendants quite independent of the section in question, having no necessary connection with the statutable duty cast upon them by that section. For such wrongful acts the defendants are liable, apart from the statute. The section is, therefore, inapplicable, and the plea bad.

Judgment for the plaintiff on demurrer.

PALMER V. SOLMES.

Slander—Incest—Special damage—Pleading.

A declaration by a married woman for slander, imputing that she had committed incest and adultery with her father, and alleging as grounds of special damages (1), the loss of the *consortium* of her husband, and (2), the loss of the society of friends, was *held*, on demurrer, good, although the second ground was clearly insufficient, in not naming the friends.

DECLARATION, by a married woman, her husband being joined for conformity only, for slander, by imputing incest and adultery between the female plaintiff and her father, alleging as special damage the loss of maintenance, by being cast off by her husband, and of his society, and of the society of friends, who refused to associate with her.

Plea : not guilty.

Demurrer : 1. That the declaration shews no cause of action. 2. That incest is not an indictable offence, nor is the charge shewn to have caused plaintiff any special damage.

January 9, 1880. *Clute*, for the demurrer, contended that the declaration was defective, because it was not alleged that the slanderous words were spoken in the presence or hearing of the husband, as the publication might have consisted only in speaking the words in presence of third parties, for whose unauthorized repetition of them the defendant would not be responsible. And as to the first count, in which the words are stated in the past tense, he argued that they might refer to a time before the marriage of the plaintiffs, in which case, at all events, the husband would not be justified in separating himself from and casting off his wife.

McMichael, Q. C., contra. Loss of *consortium* includes pecuniary loss, and the cases shew that many Judges have considered *consortium* sufficient special damage, though there is no actual decision on the point.

February 6, 1880. OSLER, J.—The plaintiff is a married woman, her husband being made a co-plaintiff for conformity, as it is called. The words charged impute that she committed the crimes of incest and adultery with her father. They are not actionable *per se*, although they impute unchastity in its most detestable form. The damages are claimed by the wife alone.

Two grounds of special damage are alleged: 1, the loss by the female plaintiff of the *consortium* of her husband; 2, the loss of the society of friends and neighbours. The second ground is clearly insufficient, for the reasons I have adverted to in the judgment delivered to-day, in the action brought, in the Court of Common Pleas, by the plaintiff's father for the same slander (*a*). The cases of *Moore v. Meagher*, 1 Taunt. 39; *Roberts v. Roberts*, 5 B. & S. 384, are in point. Loss of *hospitality* of friends, the friends being named in the declaration, is sufficient, but that is not alleged: *Moore v. Meagher*, 1 Taunt. 39; *Davies and Wife v. Solomon*, L. R. 7 Q. B. 112; *Campbell v. Campbell*, 25 C. P. 368. The judgment in the latter case proceeds, it must be assumed, on the first count of the declaration, which is not set out at length in the report, for the second count, besides the loss of the *consortium* of the husband, sets up only the loss of society of friends, the names of whom are not even given. *Ashfield v. Choate*, 20 C. P. 471, may also be referred to. The second count in that case seems not to be substantially different from that which was held to be good in *Davies v. Solomon*, *supra*.

There is nothing in either of the objections urged, on the argument, in support of the demurrer. Both the counts are capable of being so construed as to admit the evidence necessary to prove sufficient publication, and special damage; and where a pleading can be read in two ways, one of which will make it bad while the other will uphold it, the rule now is to adopt the latter. See cases collected R. & J. Dig., Pleading I., pp. 2754, 2755.

The question then is, whether the first head of special

(a) Not yet reported.

damage, viz., the loss by the wife of the *consortium* of the husband, is sufficient.

There is no case which I have been referred to or have been able to find in which the point has been decided since it was under discussion in the House of Lords, in *Lynch v. Knight*, 9 H. L. Cas. 577.

In *Davies v. Solomon*, L. R. 7 Q. B. 112, Blackburn, J., said: "The sole difficulty in deciding the case is caused by the opinion of Lord Wensleydale, in *Lynch v. Knight*. He held that no action would lie for slander of a wife when the only special damage alleged was the loss to the plaintiff of the *consortium* of her husband;" and he proceeded to say that it was not necessary to decide the question, because the averment of the loss of hospitality of friends was a sufficient averment of special damage.

In *Folkard's* edition of *Starkie* on Slander, 4th ed., the views of the Lords who took part in the judgment in *Lynch v. Knight* are given at pp. 317, 318, and they are thus summarized by Gwynne, J., in *Campbell v. Campbell*, 25 C. P. 373: "It was the undoubted opinion of Lord Campbell that when the slander consisted in accusing the wife of adultery, the loss of the *consortium* of the husband, as a consequence of that slander, was a sufficient allegation of special damage. Lord Cranworth expressed himself as strongly inclined to be of the same opinion. Lord Brougham did not profess to have arrived at any decided opinion upon the point. All he said was, that 'he doubted that.' Lord Wensleydale alone expressed a decided opinion to the contrary. It was clearly the opinion of the majority of the Court of Exchequer Chamber in Ireland in support of the sufficiency of such an allegation of special damage. All this is high authority in support of its sufficiency."

Lord Brougham's doubt is, I think, fairly to be referred to the case of an accusation of unchastity before marriage, as being sufficient special damage to maintain the action.

In *Lynch v. Knight* it was held that the special damage relied upon, the loss of the *consortium* of the husband, would not sustain the action, because it did not arise from the natural and probable effect of the words spoken (which did not impute actual adultery, but only that the wife had been "all but seduced" before marriage,) but from the idiosyncrasy of the husband and his precipitation in dismissing his wife, when he was only cautioned not to let her mix in society. Lord Campbell said, at p. 589 : "Although this is a case of first impression, if it can be shewn that there is presented to us a concurrence of *loss* and *injury* from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone, * * The loss of conjugal society is not a pecuniary loss, though I think it may be a loss which the law may recognize to the wife as well as to the husband." And at p. 591 : "Had those words contained a charge of adultery by the wife, which the defendant pretended to know, and which he asserted as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case the husband, believing the charge to be true, would have been justified in separating himself from his wife, and that separation would have been the natural, direct, and probable consequence of the slander."

In the case before me the words, with the innuendo, impute the commission of incest and adultery by the plaintiff after her marriage. For the purpose of disposing of the case on this demurrer, I think it is unnecessary to say more than that, in my opinion, the weight of authority is that the loss of the *consortium* of her husband is sufficient special damage, as being the probable, direct, and natural consequence of the slander complained of. Judgment will, therefore, be entered for the plaintiff on the demurrer. See *Vicars v. Wilcocks*, *Smith's L. C.*, 7th ed., 534; and judgment of Gwynne, J., in *Ashford v. Choate*, 20 C. P. 471.

If the plaintiff, for any reason, deems it prudent to amend

her declaration by alleging any other sufficient ground of special damage, she may do so without costs, in which case there will be no costs of the argument of the demurrer.

Judgment for plaintiff on demurrer.

REGINA V. CUTHBERT.

Transient traders—R. S. O. 174 ch. s. 466—Conviction—Hard labour.

Where goods are consigned to be sold on commission, and they are sold in the shops or premises of the consignee, and by him or on his behalf, the owner of the goods or his manager is not an occupant of such premises, nor a transient trader within the Municipal Act (R. S. O. ch. 174 sec. 466, subsec. 53, as amended by 42 Vict. ch. 31 sec. 22), merely because he accompanies the goods and assists in their sale. *Held*, also, that the validity of the by-law might be questioned on a motion to quash the conviction made under it.

January 9, 1880. *McMichael* Q. C., obtained a rule *nisi*, upon reading the *certiorari*, the return thereto and other papers filed, calling upon Lawrence Lawrason, police magistrate of the city of London, and James F. Dundas, to shew cause why a certain conviction made on the 5th day of December, 1879, by the said Lawrence Lawrason, as such police magistrate, on the information of the said James F. Dundas against the said Robert Cuthbert, should not be quashed, on the ground of want of jurisdiction in the said magistrate, and that there was no evidence to support the conviction, and that Cuthbert was not shewn to be a transient trader, and did not occupy premises for a temporary period in the said city of London, within the meaning of the statute in that behalf and the by-laws of the said city of London relating thereto, and that the

said by-laws were *ultra vires* and calculated to restrain trade.

The conviction moved against was "for that the said Robert Cuthbert, at the city of London, in the county of Middlesex, on the 29th of November, 1879, being a transient trader and a person who occupied premises in the city for a temporary period, and whose name had not been duly entered upon the assessment roll in respect of income or personal property for the then current year, did offer goods and merchandise, to wit, jewelry (not being stock of an insolvent estate, &c.) for sale without having a license so to do, contrary to the provisions of a by-law of the municipal council of the corporation of the said city of London, passed on the 28th of November, 1879, and known as "The Consolidated By-laws of the City of London, 1879."

The conviction imposed the maximum penalty of \$50, and ordered that it should be levied by distress and sale, and in default of sufficient distress adjudged the defendant to be imprisoned in the common gaol of the county of Middlesex, there to be kept, *with hard labour*, for the space of twenty-one days," unless the penalty and all costs should be sooner paid.

A copy of the consolidated by-laws of the city of London was returned with the *certiorari*. Section 232 enacted that no transient trader or other person who occupied premises within the city for a temporary period, and whose name had not been duly entered on the assessment roll of the city, in respect of income or personal property, for the then current year, and who might offer goods, &c., for sale by auction, conducted by himself or by a licensed auctioneer, or otherwise, should carry on his trade, &c., without having obtained a license so to do. Section 248 fixed the license fee at \$10 per day.

Section 360 provided that the penalty for an infraction of any of the provisions of the by-laws should be \$50, exclusive of costs, and in case of nonpayment that the same might be levied by distress and sale, and in default

of payment and sufficient distress, that the offender should be imprisoned, with or without hard labour, for any period not exceeding twenty-one days.

From the evidence returned with the *certiorari* the facts appeared to be, that the defendant was the manager in this country of the business of Messrs. Thomas Russell & Sons, and had a shop in Toronto, where he carried on for them the wholesale and retail jewellery business. In the latter part of November last he consigned to Messrs. Manville & Brown, auctioneers and commission merchants, in London, a large quantity of jewellery, to be sold by them for Messrs. Russell & Sons, the rate of which was specified in a written agreement between the parties. The goods were received by them and placed in their store. The defendant came up with them. After their arrival they were from time to time sold by auction and private sale. Manville & Brown occasionally opened the sales, and they were continued by the defendant, who, at their suggestion, had taken out an auctioneer's license. The defendant came up because it was necessary in case of such a large consignment that some one should do so for the purpose of taking care of and looking after the goods, and the only reason he acted as auctioneer or salesman was because he understood the quality of the goods. Manville & Brown received their commission on all sales made by the defendant, just as if they had sold the goods themselves, and it appeared that the defendant had no occupation of the premises separate from Manville & Brown, who had an exclusive right to stop the sales for other business and to manage them as they pleased. They assumed the responsibility as to the quality of the goods and guaranteed to refund the money if not as represented.

January 13, 1880. The case was argued before Osler, J., sitting alone, when *Ferguson*, Q. C., shewed cause. The evidence shewed that the defendant was a "transient trader" within the meaning of clause 232 of the by-law, and that he occupied premises within the city of London

at the time, and that it was undisputed that his name was not on the assessment roll for the current year at all, and that he had offered the goods for sale by auction, conducted by himself, and also by auction conducted by a licensed auctioneer, and it was admitted that he had not obtained a license as required; and, whether or not, the defendant came, upon the evidence, under the definition or description of a "trader," or "transient trader." He was, upon the evidence, certainly a person, within the meaning of the by-law, who occupied premises for a temporary purpose, and having done the acts aforesaid without the license required, he was subject to the penalties provided by the by-law, and it is not contended that the exception in respect of the sale of insolvent estates has any application here. The occupation meant by the statute and by-law is a temporary occupation in fact only, and not such an occupation as contemplated by the assessment law. It cannot be contended that the defendant, because he was not actually owner of the goods, was only an agent, and was therefore not liable to the penalties provided; for if such a contention be allowed to prevail, all by-laws of the kind could and would be easily and readily evaded, and would be simply a dead letter; and when an agent, as such, (assuming the defendant to have been an agent,) openly violates the law, he is himself accountable and responsible. Nor can it be contended with success that this was a case of consignment of goods to Messrs. Manville & Browne, for the evidence shewed that the goods were, in their transit, accompanied by the defendant and by the boy named in the evidence, and that they were in possession of the goods on the premises where they were sold, and it was shown that even the sales not made by the defendant were sales made under his direct and immediate control. Again, if there should be any ground for saying that an ordinary agent would not be liable, it must be borne in mind that this defendant was an agent in this country having the entire management and control of the extensive business here of the firm of Thomas Russell &

Son, who reside in England, and it would not do to say that under such circumstances he was not, for the purpose of making him responsible, in this case a principal. Then, it appeared that the by-law gave ample power to do all that was done here, for the conviction in no way overstepped the provisions of it. If it should be argued that the by-law was *ultra vires*, it is certainly difficult to perceive how a by-law that so slavishly followed the words of the particular statute under which it was passed, could be so, and it is hoped that a question as to the constitutionality of the statute would not be raised here. As to the amount of evidence, the law is that some evidence, which means some legal and reasonable evidence, must have been given, or the conviction cannot be supported. But can it be said that was not given here? The evidence is abundant to support the conviction. It is conclusive against the defendant; and, besides, the magistrate, before whom the conviction was had, has found specifically upon the facts which tell against the defendant, and the finding is conclusive, with the exception, perhaps, of a finding that would be necessary to give him jurisdiction, and even as to this, the law does not seem to be very clearly laid down. He referred to *Attorney General v. Woolhouse*, 1 Y. & J. 463; *Attorney General v. Tongue*, 12 Price 51; *Rex v. Turner*, 4 B. & Ald. 510; *Regina v. Williams*, 42 U. C. R. 462; *Re Ford v. McArthur*, 37 U. C. R. 542; *Paley on Convictions* 79, 5th ed.; *Mould v. Williams*, 5 Q. B. 473; *Brittain v. Kinnaird*, 1 B. & B. 432; *Regina v. Howarth*, 33 U. C. R. 537; *Rex v. McGill*, 2 B. & C., 142.

McMichael, Q. C., supported the rule. Defendant was not a transient trader: he was simply an agent in his principals' employment. He had no goods of his own which he was offering for sale. The goods were those of Russell & Son, and were consigned to the auctioneers, who received a commission on the sales, and had exclusive possession of the premises in which the goods were. The mere fact that defendant assisted at their sale did not make him an occupier of the premises. He had an auc-

tioner's license, and continued some of the sales, but the commission on the sales being received by Manville & Brown, he was neither a seller of the goods nor an occupant of the premises.

February 6th, 1880. OSLER, J.—I think it is clear that this conviction cannot be supported.

The by-law under which it was made was passed under the authority of the Municipal Act, R. S. O., ch. 174, sec. 466, sub-sec. 53, as amended by 42 Vic. ch. 31, sec. 22, which enables councils to make by-laws "for licensing, regulating, and governing transient traders, and other persons, *who occupy premises* in the city, or town, or incorporated village, for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year."

The first requisite to jurisdiction over any transient trader, or other person, in respect of any breach of such a by-law is, that he shall be an occupant of premises in the municipality. If he does not occupy premises he does not come within the section referred to.

Where goods are consigned, as in the present case, to be sold on commission, and they are so sold in the shop or premises of the commission merchant, and by him or on his behalf, I think it is impossible to say that the owner of the goods is a transient trader within the Act, merely because he happens to accompany the goods and assist in their sale.

I have read the evidence carefully, and in my opinion there is nothing to shew that any one was the occupant of the premises in which the goods were sold but Manville and Brown, or that the defendant had any other occupation of them than one of their clerks or servants would have. If there was any evidence, however slight, of the facts necessary to give jurisdiction, the magistrate would be the proper judge of the weight to be attached to it. Where, however, there is no evidence, or no reasonable

evidence, to justify the conclusion drawn by him, the conviction cannot be sustained: *Regina v. Haworth*, 32 U. C. R. 537.

The case of *The Attorney-General v. Woolhouse*, 1 Y. & J. 463, referred to by Mr. Ferguson, and other cases under the English Hawkers and Pedlars' Acts, do not apply, as the language of these Acts is much more comprehensive in its terms than that of ours.

If the by-law is illegal and beyond the jurisdiction of the council to pass, its validity may be questioned on a motion to quash a conviction made under it. See *Regina v. Osler*, 32 U. C. R. 324; *Regina v. Ross*, M. T. 3 Vic., R. & J. Dig. 1979.

Rule absolute, without costs.

RE CHAMBERLAIN AND THE CORPORATION OF THE UNITED
COUNTIES OF STORMONT, DUNDAS, AND GLENGARRY.

High School districts—Power of County Council—Leave to rehear notwithstanding lapse of time—Practice.

After the repeal of 37 Vict. ch. 27, sec. 38, O., by 40 Vict. ch. 16 sec. 18, subsec. 2, O, a County Council, having no power to determine the limits of high school districts, passed a by-law determining the same. By another by-law they repealed it, and established new limits. *Held*, that such last mentioned by-law was valid so far as it repealed the first by-law, which was invalid, but that the rest of it must be quashed.

Leave was granted, notwithstanding the lapse of two Terms, to rehear a rule made absolute setting aside a by-law, on no cause being shewn.

J. E. Rose, on behalf of one Chamberlain, obtained a rule *nisi* from Galt J., sitting alone, on the 8th day of November, 1878, calling upon the above corporation to shew cause why by-law No. 590 of that corporation, amending by-law No. 551, should not be quashed, with costs, on the following grounds :

1. That the said by-law was *ultra vires*.
2. That the said by-law purported to be drawn in accordance with chapter fifteen of the Statutes of Ontario for 1878, but did not come within the provisions of that Act.
3. That if said Council had power to abolish existing high school districts it had no power to form new districts out of portions of the county.
4. That said council had no power to form a village into a separate high school district, and
5. That such by-law was unreasonable and unjust.

The rule having been duly served upon the Warden of the corporation was made absolute, and no cause having been shewn, nor argument had thereupon, the presiding Judge endorsed the following memorandum thereon : " No cause was shewn against the within rule, it apparently being conceded the by-law was invalid. I am, therefore, of opinion the by-law should be quashed, and make the rule absolute to quash by-law."

In Easter Term last *Bethune*, Q.C., on behalf of the corporation, obtained a rule of this Court, *ex parte*, granting the corporation leave, notwithstanding the lapse of time, to set down the matter of this application for re-hearing and argument before the full Court in Michaelmas Term then next.

In Michaelmas Term the matter was set down for re-hearing and argument, and *Rose*, on behalf of the applicant, moved to set aside the last mentioned rule of this Court granting leave to re-hear, on the ground that all the material facts on which the rule to be re-heard was made, were not, in obtaining the rule to re-hear, brought before the Court. The Court thereupon directed his motion paper to be filed, that notice thereof should be given to the opposite party, and that both arguments should be heard at the same time.

On December 6th, 1879, *Bethune*, Q.C., accordingly shewed cause to the rule to quash the by-law and supported the by-law to re-hear. The by-law ought not to be quashed, because, apart from the form of it, the legal consequences resulting from it to all persons affected are just the same as if the words of the statute had been followed. Revised Statutes of Ontario, ch. 205, sec. 30, recognize the right of the county council to abolish or discontinue the high school districts. The statute 41 Vic. ch. 15, sec. 1, makes it obligatory upon the council, upon requisition by the reeves and deputy-reeves of the municipalities in Dundas, to pass a by-law abolishing high school districts. Under either of these statutes it is clear that the council has the right to put an end to the school districts. This does not put an end to the schools, which continue until abolished under sections 5, 6, and 7, of ch. 205. The by-law was passed 22nd June, and repealed an earlier by-law which had created the high school district in question. Unquestionably the repeal of the by-law creating the high school district discontinued it, because except for that by-law it had no existence. The later sections of the by-law of June, 1878, were unnecessary, but these sections do no

harm, as the legal liability is precisely the same as if the villages had not been created into high school districts. The only importance this matter has arises out of taxation. Under secs. 29, 30, and 31, of ch. 205, the school is supported as follows: The government grant a sum of money, the county grants an equivalent sum, and any sum necessary for the support of the school must be raised by the local municipality in which the school is situate, or, if that is part of a high school district, then by the high school district. Now, if Morrisburg were the high school district, it would have to raise just the same sum which it would have to contribute as the local municipality. It is clear that the county council intended to put an end to this district in so far as it embraced Williamsburg and Winchester, and the form in which that is done is of little consequence.

Richards, Q. C., J. E. Rose with him, supported the rule to quash the by-law and the motion to set aside the rule to re-hear. The by-law was *ultra vires* of the county council, as no power is given by statute to county councils to form high school districts; and even if power to form high school districts be given, it was never contemplated that a village should be erected into a high school district. 34 Vic., O., ch. 33, sec. 40, provides for forming high school districts "from the whole or part of one or more townships, towns, *and* villages, within its jurisdiction." 37 Vic., O., ch. 27, sec. 39, empowers a council to "form a village *or* town, *and* the whole or part of one or more adjoining townships within its jurisdiction, into a new or additional high school district." Section 42 speaks of a city or a town being separated from the county for municipal purposes, and constitutes such city or town a separate county for high school purposes. Section 43 enables a town so separated to unite the whole or part of an adjoining township for high school purposes. 40 Vic. ch. 16, sec. 18, sub-sec 3, amends section 39 of 37 Vic. ch. 27, by striking out the words empowering a council to form a village *or* town, *and* the whole or part of one or more of the adjoining town-

ships within its jurisdiction, into new or additional high school districts; and limits the power to establishing new schools. By the law, as thus amended, no power is given to form new districts, but merely to discontinue old ones. Section 65 of the R. S. O. ch. 205, gives pupils in any part of the county the right to attend high schools, except in *cities* or *towns* separated from the county, thus not contemplating the forming of a *village* into a high school district. 41 Vic., O., ch. 15, sec. 1, was passed to meet the difficulties arising from the decision in *Chamberlain v. Stormont*, 42 U. C. R. 279, in that this statute gives the power to abolish, but not to form, except to form a county into a high school district.

They further referred to R. S. O. ch. 205, secs. 7, 8, and 9, consolidating amendments of sections 39 and 40 of 37 Vic.; also sections 30 and 31, consolidating 37 Vic. ch. 27, secs. 45 and 46, as amended by 40 Vic. ch. 16, sec. 18.

The facts are stated in the judgment.

February 2, 1880. ARMOUR, J.—On the argument we disposed of the motion to set aside the rule granting the corporation leave to re-hear, by refusing to set it aside and determining that we would re-hear the rule to quash the by-law.

On the 12th of October, 1877, a by-law was passed by the Corporation of the United Counties of Stormont, Dundas, and Glengarry for determining the limits of high school districts within the said counties, which repealed all former by-laws relating to such districts, and provided that the counties should be divided into five districts for high school purposes, as follows :

“GLENGARRY.

“No. 1. Williamstown District, embracing the townships of Lancaster and Charlottenburg, and the village of Williamstown. No. 2. Alexandria District, embracing the townships of Kenyon and Lochiel, and the village of Alexandria.”

"STORMONT.

"No. 3. Cornwall District, embracing the townships of Cornwall, Osnabruck, Roxborough, and Finch, and the town of Cornwall."

"DUNDAS.

"No. 4. Morrisburg District, embracing the townships of Williamsburg and Winchester, and the village of Morrisburg. No. 5. Iroquois District, embracing the townships of Matilda and Mountain, and the village of Iroquois.

The above mentioned high school district, comprised all the territory within the united counties of Stormont, Dundas, and Glengarry."

On the 22nd of June, 1878, the by-law No. 590, now sought to be quashed, was passed by the said corporation, "repealing that portion of the said by-law No. 551 which relates to the county of Dundas," and providing that the high school districts in the county of Dundas should be composed as follows: that district No. 4 should embrace and be composed of the village of Morrisburg only: that district No. 5 should embrace and be composed of the village of Iroquois only. It also provided that all other by-laws inconsistent therewith should be repealed.

This by-law was passed upon the written requisition of a majority of the reeves and deputy-reeves of the county of Dundas, as follows: "The undersigned majority of the reeves and deputy-reeves of the county of Dundas hereby request, in accordance with chapter 15 of the statutes of Ontario for 1878, that your honourable body will pass a by-law abolishing the present high school districts of Nos. 4 and 5, and that the corporation of the village of Morrisburg be constituted high school district No. 4, and the village of Iroquois be constituted high school district No. 5."

By-law No. 551 never had any validity. It was passed after the repeal of 37 Vic., ch. 27, sec. 38, by 40 Vic., ch. 16, sec. 18, sub-sec. 2, and when the county council had no power to determine the limits of high school districts.

I see no objection therefore to the passing of the by-law No. 590 for the purpose of repealing it.

It should however have been confined to the simple repeal of that portion of by-law No. 551 which relates to the county of Dundas, for the county council had not then the power to determine the limits of high school districts.

The by-law No. 590 will therefore be quashed, except in so far, and so far only, as it repeals that portion of the said by-law No. 551 which relates to the county of Dundas.

And we think that the corporation should pay to the applicant his costs.

The rule will therefore be absolute as above, with costs.

HAGARTY, C. J., concurred.

CAMERON, J., took no part in the judgment, being engaged in holding the Toronto Assizes.

Rule accordingly.

COSGRAVE ET AL. V. BOYLE, EXECUTOR OF JAMES STEWART.

Promissory note—Death of endorser—Notice of dishonour.

S. endorsed a note to the plaintiffs for the accommodation of the maker, and the plaintiffs discounted it at a bank. S. died before it fell due, and at its maturity on the 8th of March, 1879, it was protested at the bank for non-payment, where the death of S. was unknown, and notice was sent addressed to S. at the place where the note was dated. The defendant, executor of S., proved the will in January, and the plaintiffs, who knew of the death of S., had written to his son three days before maturity, calling his attention to the note. The plaintiffs having taking it up and sued defendant,

Held, that the notice was insufficient. ARMOUR, J., dissenting.

DECLARATION, on a note by one Margaret Purdy, dated 5th November, 1878, payable to the order of James Stewart, for \$500, at four months, averring presentment and dishonour.

Pleas :

1. Denial of endorsement.
2. Denial of presentment.
3. Denial of notice of dishonour.
4. Payment.
5. That the note was not properly stamped.

Issue.

The case was tried at the last Summer Assizes, at Toronto, before Cameron, J., without a jury.

The note was dated at Toronto, payable at the Bank of Commerce, and had the endorsement of James Stewart and of Cosgrave & Sons.

On the 8th March it was protested for nonpayment on presentment at the bank, and the notary proved the mailing of notices to Margaret Purdy, to James Stewart, and Messrs. Cosgrave & Sons, all of Toronto.

Mrs. Purdy, the maker, was indebted to plaintiffs, and Stewart endorsed her note to them merely as surety for her.

Plaintiffs discounted the note at the Bank of Commerce, and, after its dishonour, took it up, and brought this action.

Stewart resided at Lansing in the county of York, and that was his post office. He died about December 5th, during the currency of the note.

The bank, who were the holders at maturity, were not aware of Stewart's death, and sent notices of dishonour addressed to Stewart at Toronto, where the note professed to be made, not knowing any other address.

The bank officer swore he knew nothing about the endorser and made no enquiries. The plaintiffs did general business with that bank. They were aware of Stewart's residence and address, and also of his death before the note matured.

The defendant Boyle was sole executor of Stewart, and proved his will on 13th January, 1879, before the maturity of the note.

On the 5th March, 1879, three days before maturity, plaintiffs sent a letter to Charles Stewart, a son of testator, addressed to Lansing post office, saying they held this note, endorsed by his deceased father, for Mrs. Purdy, requesting his attention to it, as it would fall due on Saturday 8th instant.

On the 19th of March plaintiffs' solicitor wrote to the defendant that the plaintiffs had placed the note in his hands for collection, and requesting his attention to it.

The defendant swore this was the first letter or notice he received. He said Stewart's son had spoken to him of there being a note against the estate, about the 10th or 11th March, not mentioning plaintiffs' name; he said he was so informed by a letter.

Plaintiffs' clerk swore that when he wrote the letter of 5th March to Charles Stewart he did not in fact know there was an executor.

Objection was taken to the sufficiency of the stamps, which was overruled, and the note was double-stamped. It was also objected that no sufficient notice of dishonour had been given.

The learned Judge entered a verdict for defendant for \$409.28, reserving leave to move to enter it for plaintiff.

In Michaelmas Term last *O'Sullivan* obtained a rule *nisi* accordingly.

November 26, 1879. *McMichael*, Q. C., shewed cause. The personal representative was entitled to notice, but none was given him, though there was notice sent to the deceased. The 37 Vict. ch. 47, D., applies. The bank is not suing, and these parties do not hold through the bank. There was no notice given and no excuse offered as to these particular parties for not having given it. He cited *Barnes v. Reynolds*, 4 Miss. R. 114; *Linderman v. Guldin*, 34 Penn. R. 58; *Chitty on Bills*, 11th ed., p. 320; *Caunt v. Thompson*, 7 C. B. 400; *Merchants Bank v. Birch*, 17 Johns. 26.

On the question of stamps. These should not have been allowed to be put on. The maker must stamp when he makes the note. But under any circumstances the declaration was not proved. Notice was not given and no sufficient excuse for the omission was offered: *Bray v. Hadwen*, 5 M. & S. 68; *Daniel on Negotiable Instruments*, 2nd ed., vol. 2, pp. 82, 83, 89.

Robinson, Q. C. (*O'Sullivan* with him), contra. The short contention is, that the obligation as to giving notice must rest on the holder at the time of the maturity of the note, and the notice given by the bank being sufficient, it enured to the benefit of these plaintiffs. He referred to *Chitty on Bills*, 11th ed., p. 333; *Byles on Bills*, 13th ed., p. 294, and Note; *Story on Promissory Notes*, 7th ed., sec. 310; *Daniel on Negotiable Instruments*, 2nd ed., vol. 2, secs. 987, 1000, 1058; *Chalmers*, 149, 155.

March 6, 1880. HAGARTY, C. J.—We think it unnecessary to discuss further the stamp objections.

There is a singular absence of authority in England on the question before us, as to the law of notice in a case like the present.

Byles, (13th ed.,) p. 55, merely says: "Presentment, notice of dishonour, and payment should be made by and to the executor or administrator in the same manner as by or to the deceased."

Chitty on Bills, (11th ed.,) 333: "If the party entitled to notice be dead, it should be given to his executor or administrator." Note: "There are no English decisions to this effect, but that the law is as stated in the text seems to have been taken for granted in *Caunt v. Thompson*, 7 C. B. 400. In America it has been so held; and further, that if there is no personal representative at the time, notice sent to the residence of the deceased is sufficient: *Merchants Bank v. Birch*, 17 Johns. 25; *Bayley*, 418, Am. Ed."

Bayley on Bills, 6th ed., 286: "The representative of such drawee, &c., in case of death, bankruptcy, &c., stands in his place and is equally entitled to notice."

2 *Williams on Executors*, 2011, 8th ed.: "If, when a Bill of Exchange becomes due and is dishonoured, the drawer or endorser is dead, notice of the dishonour ought to be given to his personal representative." Note: "In America it has been held that where the indorser of a note is dead at the time it becomes due, and there are executors or administrators at that time known to the holder, notice must be given to them; but that if there are no personal representatives at the time, a notice sent to the residence of his family is sufficient, and that it is not necessary afterwards to give notice to executors or administrators subsequently becoming such;" citing 17 Johns. 25; *Bayley*, Am. Ed. 418; *Roscoe on Bills*, note (44).

Story on Notes, 7th ed., 1878, p. 411, sec. 310: "If the indorser entitled to notice is dead, then notice should be given to his personal representative, if there is any: if there is none, then notice may or should be left at the domicile of the deceased." The notes at the foot refer to the authorities.

The argument mainly urged to us was, that the bank had done all that was required of them in giving notice, and that plaintiffs could recover on the bank's title, even if not on their own.

The Act of 1874, ch. 47, sec 1, declared that notice of dishonour should "be sufficiently given if addressed in

due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature, on such bill or note designated another place, when such notice shall be sufficiently given, if addressed to him in due time at such other place."

If therefore Stewart had been living, the notice addressed to Toronto would have been sufficient. But are we to enlarge the words used in this enactment by extending it to the executor in the case of death, and to hold that the latter is equally bound by a notice so addressed?

We have no English or Canadian authority holding it sufficient to send a notice addressed to a deceased person, more especially, unless it could be shewn that it duly reached the legal representative.

In *Bank British North America v. Jones*, 8 U. C. R. 98, the Court held that a notice addressed to the executrix or executors of the late Mr. Justice Jones, Toronto, the former residing in Toronto, the latter elsewhere, was insufficient. It was remarked it could not be assumed that the post-master would take the trouble to enquire who was the executrix or executor.

This case is noticed in *McKenzie v. Northrup*, 22 C. P. 385, and a notice similarly addressed was mailed. In such a case the Court held that the holder must shew in addition that the notice came to defendants' hands in due time.

Bayley, J., says, in *Rohde v. Proctor*, 4 B. & Cr. 522: "When a bill is dishonoured, it is the duty of the holder to use due diligence to give notice to such of the parties to the bill as would be entitled to a remedy over upon it if they took it up; and the holder makes the bill his own as against those parties, and loses his remedy upon the bill against them by neglecting to use such diligence * * It is not necessary to decide in this case whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavour to find out his assignee, nor is it necessary to say what would be the case if such a party's house were shut up, and there were no means afforded there of discovering him or his representatives."

In *Caunt v. Thompson*, 7 C. B. 408, before the bill matured the acceptor had died, making defendant, the drawer, his executor, and he had proved the will. At maturity the holder sent to the acceptor's former residence to present, where he saw defendant, the drawer, to whom it was presented. Defendant said he was executor, and "you must persuade Caunt (plaintiff) to let the bill stand over a few days, because Whitley the acceptor has only been dead a few days. I will see it paid."

Presentment and notice were traversed. Leave was given to amend by averring the death of the acceptor; that defendant was executor, and presentment and notice to him. After much discussion the Court held that the plaintiff could recover, the notice being sufficient. But nothing is said on the point as to the law in the case of the death of a party. As is said in *Chitty on Bills*, 333, the law in this case seems to have been taken for granted. See also *Chalmers' Dig.* 149, 155.

In *Ex parte Baker in re Bellman*, L. R. 4 Chy. Div. 795, the drawer of a bill had become bankrupt, and a trustee appointed before the bill matured. It had been discounted at a bank. The bank did not know of the appointment of the trustee, and sent notice of dishonour to the drawer at a brewery which he had previously carried on, but had sold and left some months before the bill was drawn. This brewery (the Oak Brewery) was entered in the bank books as Bellman's address, and they knew of no other.

The registrar rejected proof of the bill on the ground of insufficient notice of dishonour. The trustee appealed. In the Court of Appeal James, and Mellish, and Baggallay, L. JJ., admitted it to proof. James, L. J., says: "It is very odd, considering the thousands (I may say millions) of bills that must have been the subject of proof in this country, that there never has been a decision that the holder of a dishonoured bill must give notice of dishonour to the assignees of a bankrupt drawer to entitle him to prove on the estate. The absence of any decision goes very far indeed to shew that has never been supposed to be the law."

After commenting on the hardship of requiring a bank to make constant inquiries as to parties to bills, he adds, "It does not appear to me that any good reason can be suggested why the holder of a bill should give notice of dishonour to any one but the persons whose names he finds upon the bill." Mellish, L. J., also points out the difficulties attending any other rule.

It is unfortunate for us that no reference appears throughout the discussion to the case of the death of a party to a bill. It is treated solely on the particular facts; yet the reasoning appears in most respects to apply to the case of death.

It may perhaps be urged that it differs in this, that the drawer in that case remained, and good notice was given to him, the difficulty arising merely from his altered *status* under his bankruptcy. I fear we cannot get much more aid from authorities binding on us.

If the bank were the plaintiffs here we should, I think, go a step beyond any previous decision, if we hold this notice sufficient.

The words of our statute do not point to the case of death, but merely as to the sufficiency of a named address "to any party to any bill or note entitled to such notice." If the bank were suing and we hold that notice addressed to the deceased be sufficient notice to his executor, then the bank would succeed.

The American cases go further. There is a summary of them in "*Wade on the Law of Notice*," (1878,) secs. 763 to 767; see also 2 *Daniel on Negotiable Instruments*, 54, 55: "It has been held that if it be known to the holder that the indorser is dead, notice should be sent to the representative, if there be any, and it can be ascertained by reasonable diligence who or where he is. If there be no representative, notice sent to the family residence of deceased will be sufficient; and it is likewise sufficient if notice be addressed to the deceased when, without negligence, the holder is not aware of his death."

Merchants' Bank v. Birch, 17 Johns. 6, is usually referred

to for this last proposition. It was decided in 1819. The endorser had died at sea some days before the note had matured, and in necessary ignorance of his death notice was sent addressed to him. The Court held it sufficient, Spencer, C. J., saying: "It is a novel principle, unsupported either by precedent or authority, that notice is to be given to the representatives of an endorser, and who became such long after the note had fallen due. The rights of the holder of a note or bill are to be determined by his acts when the note or bill becomes due; and if he then give such notice as under the existing state of facts the law requires of him, his rights are fixed, and he cannot be required to superadd any other notice at a future period."

In *Linderman v. Guldin*, 34 Penn. 58 (1859), the American law is fully reviewed, and the case of 17 Johns. is followed. Neither holder nor notary knew of the death. "It is therefore, (the Court says,) the very case in which no other notice could have been given." Notice addressed to the deceased was held sufficient without proving it actually reached the executors. The case of *Barnes v. Reynolds*, 4 How. Miss. 114, cited by Dr. McMichael, is there commented on. *Beales v. Peck*, 12 Barb. 245, is to the like effect.

Then we have to consider whether the Cosgraves, plaintiffs, are entitled to stand precisely in the position of the bank, and to recover on the title of the latter, if good. *Beale v. Parrish*, 20 N. Y. 408, (1859,) seems against such a claim. Plaintiff had discounted the note with the Chemical Bank. The indorser lived at Canandaigua. It was payable in New York. The bank notary, after due presentment, enquired at the bank. They did not know. He then applied to plaintiff, who said he resided at Buffalo or Dunkirk, and desired notice to be sent to each place, which was done. It was proved that information had been previously given to the plaintiff of his true address. The plaintiff retired the note and sued. The Court decided that the bank could have recovered, having applied to the proper quarter for information, and acted thereon. "Inability to discover

the residence of the indorser, excuses the proper service only so long as such inability continues. When the residence becomes known to the party wishing to hold the indorser, it is his duty then to be diligent in making service. * * * The law will go no further than necessity requires. 'The same rule would be applicable to the purchaser from the bank.'

* * * The Court held that plaintiff having had correct information, could at once have given the proper notice. * * * They paid the note to the bank in discharge of their liability as indorsers, not as surety for defendants. The doctrine of subrogation in favour of a surety does not attach. Their suit is based upon the defendant's indorsement to them. To recover it was necessary to shew notice of dishonour served upon the defendants by some party to the note, or that there was a legal excuse for the omission. Such excuse was shewn so far as the bank was concerned, but none whatever as to the plaintiff. They could have at once served the proper notice upon the defendants upon receipt of notice by them from the bank. While it is settled that notice by the holder to defendants would have enured to the benefit of the other indorsers, there is no authority holding that an excuse for the omission to serve by the holders shall extend to other parties for whom there is no such excuse."

If the principles here declared be sound, they appear to be fatal to the present plaintiffs.

Of course the plaintiffs invoke the well known principle that if the bank's title be perfect, they ought to be allowed to shelter themselves behind it, notwithstanding any knowledge of their own impeaching the bill or note.

But the principle seems generally applied to matters antecedent to the note passing into the hands of the bank, and who, as innocent holders for value, are not affected thereby.

The reason of this principle seems to be, that otherwise an innocent holder would be unable to sell or dispose of a security which he had lawfully obtained.

But when the whole difficulty as to the right of recovery arises, as it did here, by and through the present plaintiffs and the bank, the principle may not apply.

These plaintiffs sue an endorser, who denies notice: he, in fact, never received notice, nor was it sent to him.

The plaintiffs gave the note to the bank, fully aware of Stewart's true address. Three days before it matured they wrote to Stewart's son at his true address, aware of his death, stating that they (the plaintiffs) held this note so endorsed, and calling attention to it, naming the day it would mature.

They are themselves notified of the dishonour on the day of protest, and could then at once have given a good notice to Stewart's representative. If ignorant of the name of such representative, still a very slight amount of diligence would have availed to give a sufficient notice in one shape or the other.

Plaintiffs intervened here at the time the notice ought to be given, but neither told the bank of the death of the endorser nor take on themselves the duty of giving proper notice, which they had ample opportunity of doing.

I do not dispute the perfect right of the bank to transfer their complete title against endorsers notified as the statute of 1874 permits.

Here we have a very different state of facts—the death of the endorser, and the consequent impossibility to fulfil the literal requirement of the statute—the default of the plaintiffs in giving proper information to the bank of facts known to them as to Stewart's death—their direct intervention as the note matured, and their own unnecessary failure to give proper notice. They sue as the direct indorsees of Stewart.

On the whole, I come to the conclusion that the traverse by the defendant of notice of dishonour should be found in his favour.

If we held in plaintiffs' favour we must say: 1st. That the Act applies to the case of a deceased endorser, and 2nd, That the notice addressed to him would be good against his representatives.

The latter point, on the reason of the thing, and with the aid of the American authorities, I incline to hold, apart from the difficulty that the notice here goes to an address wrong in fact.

As to the plaintiffs' right to recover on this record, the reasoning of the American Court, in the very analogous case of *Beale v. Parrish*, is wholly against them.

I repeat that if the case wholly turned upon the sufficiency of a notice addressed to deceased at his actual residence, I would incline to uphold it.

We are here asked to go further, and to hold it sufficient in that form addressed not to the real address, but to one allowed by special enactment to be good as against him.

I, of course, feel the force of the argument, that anything sufficient to have bound him, if living, ought equally to bind his executors.

But in the present state of the authorities I must leave it to a higher jurisdiction to hold this notice sufficient.

ARMOUR, J.—The plaintiffs' right to recover depends altogether upon whether the notice of dishonour of the note sued on, given by the Bank of Commerce, was sufficient.

If it was sufficient, then it enured to the benefit of the plaintiffs, as endorsers of the note, and they are entitled to recover in respect of it, if the Bank of Commerce would have been so entitled.

The law (37 Vic., D., ch. 47, sec. 1,) provides that, "Notice of the protest or dishonour of any bill of exchange or promissory note, payable in Canada, shall be sufficiently given, if addressed in due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature on such bill or note, designated another place, when such notice shall be sufficiently given if addressed to him in due time at such other place; and such notice so addressed shall be sufficient, although the place of residence of such party be other than either of such before mentioned places."

The note in question was dated at Toronto, and was endorsed by Stewart, without designating any other place to which notice to him of dishonour should be sent.

Notice of dishonour was sent in due time, addressed to James Stewart, Toronto, and the effect of this notice, so addressed and sent, must be regarded, in the light of this statute, precisely in the same way as if it had been sent in due time addressed, "James Stewart, Lansing:" Stewart's proper post-office.

The question, therefore, is reduced to this, would notice of the dishonour of the note sued on, sent in due time, addressed to Stewart at his proper post-office, have been sufficient, Stewart being dead at the time? If it would have been, then the notice sent was sufficient.

There is no authority in the Courts in England that such a notice would be insufficient, and there is authority in the Courts in the United States that it would be sufficient.

Whichever way we decide we establish a precedent, and in doing so we ought to consider, not only what the result in this case will be, but what the result will be generally of the precedent we establish.

Stewart himself cared little about getting notice, for he designated no place to which notice should be sent, leaving it to be sent to Toronto, where he was quite unlikely ever to get it; his family were made aware, shortly before the note fell due, that the maker could not meet it, and it is difficult to imagine any detriment that Stewart's estate has suffered by reason of the notice having been given as it was.

I think we will do no injustice in this case by holding the notice sufficient. If, however, we hold it insufficient, the plaintiffs will lose the money which they advanced solely upon the faith of Stewart's endorsement, made by him at the request of the maker, and for her accommodation.

Why, in reason and justice, should the holder of a note be obliged to look beyond the names upon it for a person to whom he should give notice of dishonour? Why should

he be obliged to find out at its maturity, in order to give a sufficient notice of dishonour, whether the endorser is alive or dead; and if dead, whether he died testate or intestate; if testate, whether he named an executor, and whether such executor intends to accept probate; and if he will accept, the time when he will so accept; or if he died intestate, why should he be obliged to watch the Surrogate office in the proper county to ascertain when administration is granted, and to whom?

I think we ought to hold that a notice of dishonour, sent in due time and as the law directs, addressed to the *name* upon the bill or note, a sufficient notice; and I think the benefit and convenience of the public will be thus best served, and that no injustice can arise from such a holding. This seems to me to be the logical result of the decision in *Ex parte Baker, Re Bellman*, L. R. 4 Chy. Div. 795.

I think the notice in this case sufficient, and that the rule should be absolute to enter the verdict for the plaintiffs for the amount of the plaintiffs' interest and costs.

The case of *Beale v. Parrish*, 29 N. Y. 468, has, in the view I have taken, no analogy to this one.

CAMERON, J.—I concur in the conclusion arrived at by the learned Chief Justice. Were it not for our statute, 37 Vic., ch. 47, D., I do not think there could be any doubt, under the authorities in the United States, and the general concurrence of the authors of English text books on the subject, that in case of the death of an indorser of a promissory note or bill of exchange before maturity of the note or bill, the executor or administrator of such endorser would be entitled to notice of the dishonour of the note or bill; and I do not see that the statute makes, in this respect, any difference in the law. The first section declares: "Notice of the protest or dishonour of any bill of exchange or promissory note, payable in Canada, shall be sufficiently given, *if addressed in due time to any party to such bill or note* at the place at which such bill or note is dated, unless any such party has, under his signature on

such bill or note, designated another place, when such notice shall be sufficiently given if addressed to him *in due time* at such other place, and such notice so addressed shall be sufficient, although the place of residence of such party be other than either of such before mentioned places."

The only change this provision has made in the law is in respect to the place to which the notice may be sent or addressed. It does not make any change in respect to the parties entitled to notice, or the time in which notice must be given. In *Williams* on Executors, 6th ed., p. 1849, it is stated: "If, when a bill of exchange becomes due and is dishonoured, the drawer or indorser is dead, notice of the dishonour ought to be given to his personal representative;" and for this position the writer cites *Chitty* on Bills, 8th ed., p. 369; *Roscoe* on Bills, p. 199; *Byles* on Bills, 5th ed., p. 216. The same proposition is found in *Chalmers's Digest*, and *Daniel* on Negotiable Securities.

On the death of a party to a bill or note, his legal personal representative takes his place, and becomes, as it were, a party to the bill or note, and subject to all the liabilities, and entitled to all the rights, that attach or belong to the position. In *Bromage v. Lloyd*, 1 Ex. 32, it was held that an indorsement by the payee of the note, made payable to order, without delivery before death of such payee, conveyed no right of action to the transferee, when delivered by the executor without his indorsement after the payee's death. And in *Whitehead v. Taylor*, 10 A. & E. 210, Lord Denman, C.J., in giving judgment, said: "The law knows no interval between the testator's death and the vesting of the right in his representative." The right of the testator in his life was to receive due notice of the dishonour of the note sued on. On his death this right, together with the obligation to pay, on default of the maker duly notified to him, was transferred to the defendants.

The notice sent by the bank to the address of the deceased was not notice to the defendants. The seeming hardship of holding that the holder of a promissory note can be affected prejudicially by the death of the endorser

is less real than at first sight it appears. Before a creditor can enforce his claim against his debtor he must find him, except under circumstances authorizing proceedings against him in his absence; and as the law stands, when the holder of a note is unable to find the endorser at maturity he has the same time, when he makes due and diligent enquiry, after he has found him, to give him notice of dishonour that he had at the maturity of the note: *Firth v. Thrush*, 8 B. & C. 387. In the present case the bank holding the note at maturity had no notice of the testator's death, and it would, on discovering the fact, have been entitled to have given notice to the executors, or, in accordance with the decision in *Merchants Bank v. Birch*, 17 Johns. 27, to have sent the notice to or left it at the place of residence of the testator at the time of his death. The plaintiffs, who discounted the note with the bank, and knew of the death of the testator and his place of residence, might, if they had thought fit, have obviated all difficulty by giving a proper notice to the defendants, and not having done so, there is no merit in their claim to have the defendants deprived of their clear legal right to notice on the facts established in evidence. We have nothing to do with the reasonableness of the law requiring notice: it does require it, and governs the Court.

Rule discharged.

IN RE LANGDON AND THE ARTHUR JUNCTION RAILWAY
CO. AND THE CORPORATION OF THE TOWNSHIP OF
ARTHUR.

*By-law—Railway bonus—Bribery—Refusal of Council to pass by-law—
Mandamus.*

Held, that where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass the same because the passage of the by-law has been procured by bribery, and may set up such bribery in answer to an application for a mandamus.

Quære, whether it must be shewn, as it was here, that enough votes have been bribed to destroy the majority.

Semble, that a mandamus should not be granted at the instance of any railway company or person to be benefited by such by-law, where a single act of bribery or corruption has been brought home to the applicant.

On the 16th September, 1879, *Kerr*, Q. C., on behalf of Mark Langdon and the Arthur Junction Railway Company, obtained a rule *nisi* calling upon the corporation of the township of Arthur to shew cause why a writ of *mandamus* should not issue, directed to the corporation of the township of Arthur and to the members of the municipal council of the said township, commanding the said council to read a third time and pass a certain by-law of the said corporation of the township of Arthur, entitled: "A by-law to aid and assist the Arthur Junction Railway Co. by giving \$10,000 to the said company by way of bonus upon certain conditions hereinafter mentioned," and to issue debentures therefor, and to authorize the levying of a special rate for the payment of debentures and interest, which by-law had been read a first and second time by the said council and had been submitted to the electors of the said township therein mentioned, and had been duly approved of and carried by the majority of the votes given thereon, on the 28th day of March, 1879.

From the affidavits filed in support of the application it appeared that a petition duly signed by fifty ratepayers, pursuant to the 23rd section of 41 Vict. ch. 42, O., the

Act by which the railway company was incorporated, had been presented to the council of the township in the month of February, requesting the council to submit a by-law for the approval of the ratepayers of the portion of the municipality defined in the petition, to aid the railway company in question by a grant or bonus of \$10,000 : that a by-law had accordingly been introduced and ordered to be submitted to the vote of the electors on the 28th of March, 1879 : that having been duly advertised and published in accordance with the requirements of the Municipal Act it was upon the 28th March voted upon and approved, and carried by the majority of votes given thereon, 116 votes having been given in favour of the by-law and 109 votes against it.

Several applications were made to the council on behalf of the railway company to read the by-law a third time and pass it. This was opposed on the ground that corrupt practices had been committed by the promoters of the by-law in order to secure its carriage at the polls, and on the 23rd June, 1879, the council passed a resolution refusing to pass the by-law on this ground.

On the return of the rule *nisi* counsel for the township filed affidavits setting forth specific charges of corrupt practices committed by the promoters of the by-law, and obtained an order to take evidence thereon *vivâ voce* before the Court.

On the 20th day of January a number of witnesses were accordingly examined in pursuance of the order.

The voters' list was produced. It appeared that some one had voted in the name of Dr. J. R. McCulloch, of Enniskillen, a voter. Dr. McCulloch proved that he had not voted, and knew nothing of the by-law. It was not shewn at whose instance the absent voter had been personated.

One E. J. O'Callaghan was called on behalf of the township, but although shewn to have been duly served with the order for his attendance, did not appear.

Six distinct charges of bribery were proved against

O'Callaghan and others associated with him. They were shewn to have been actively canvassing on behalf of the railway, and O'Callaghan was sworn to have been a director

The applicants called no witnesses, and filed no further affidavits.

20th January, 1880. *H. J. Scott*, before Osler, J., sitting alone, shewed cause for the corporation. If it can be shewn that the by-law was passed by means of any of these corrupt practices, the motion should be refused, as the Court will not grant a mandamus to pass a by-law when it is apparent that such by-law would afterwards be quashed under sec. 325 of the Municipal Act. In construing that section it is not necessary to prove that each voter was bribed, as upon a scrutiny of votes. There is no way of tracing the votes. The ballot is put into the box and it cannot be told how the vote was cast. Assume the majority to be large, to what extent is the bribery to be proved? Everything should be presumed against the applicant. It lay within his power to refute all that was sworn to. The question of agency does not arise here. It is whether the by-law fairly and freely represents the sense of the community, and a Judge is quite justified in holding from what has been proved that other bribery took place.

Kerr, Q. C., contra The question, as the township puts it, is, whether the by-law is liable to be quashed. That is not the question. The mandamus should be granted, leaving it to the electors afterwards to move to quash under the Municipal Act. But even on this evidence the by-law would not be quashed. The words, "If any by-law, the passage of which has been procured," &c., means *the procuring of the majority* in favour of the by-law, which is not shewn. It is not like a Parliamentary election where the election is avoided by the act of an agent. *The matter is to be treated as upon a scrutiny.* It is admitted that it is impossible to shew agency, and therefore it is necessary to shew *vote by vote* that the majority is bribed. Unless it is expressly enacted that the bribed vote shall be struck off,

it will not be: Brockville Election Case, 32 U. C. R. 139. It must be shewn that there was bribery to such an extent as to affect the majority. That has not been shewn.

February 27, 1880. OSLER, J.—When this rule was first returnable, the applicants objected that the township had no right to oppose it on the ground that the passage of the by-law had been procured by corrupt practices, but were bound to comply with the 24th section of the Act incorporating the railway company, which corresponds in effect with the 318th section of the Municipal Act, and to read the by-law a third time and pass it, more than a month having elapsed since the voting, and the by-law having been approved or carried by the majority of votes given thereon.

On the preliminary argument upon this objection I was of opinion that the township council were at liberty to shew that corrupt practices had been committed in procuring the passage of the by-law, as a reason why the discretion of the Court should not be exercised in favour of the applicants by granting the mandamus.

On the recent argument the objection was again put forward, and it was urged that the council should be compelled to pass the by-law, leaving it to be attacked by any one who might think proper to move to quash it under the 325th and subsequent sections of the Municipal Act. I see no reason, however, to alter the views I have already expressed on this point; on the contrary, I should say that it is not only the right but the duty of the council, in the interest of the community they represent, to refuse to pass a by-law where, as in this case, specific charges of bribery and corrupt practices are brought to their knowledge.

The 325th section of the Municipal Act enacts, that any by-law, the passage of which has been procured through or by means of any violation of the provisions of the 201st and 202nd sections of the Act, being the sections directed against bribery and intimidation, shall be liable to be quashed upon any application to be made in conformity with the provisions of the Act.

If it is made to appear on the application for a mandamus that the passage of the by-law had been procured by means of any violation of these sections, it would be futile to direct the council to read it a third time and pass it, when upon the same evidence on another application the Court might be compelled to quash it.

But, independently of the statute, I would never grant a mandamus, at the instance of any railway, or other corporation or person, to compel a municipality to pass a by-law granting aid, bonus, or exemption, where a single act of bribery or corrupt practice was brought home to the person or corporation to be benefited by such by-law, or the agent of such person or corporation. To do so would be to permit the fountain of justice to be touched by polluted hands, and to fail in the exercise of that sound judicial discretion which should guide the Court in dealing with such an application. The limits of that discretion in applications of this nature I accept as defined in the judgment of Moss, C. J. A., in *The Stratford, &c., R. W. Co. and the Corporation of the County of Perth*, 38 U. C. R., in App. 113, 157.

It is specially important that by-laws of the character of the one in question here should represent the honest opinion of the general body of the ratepayers, who are asked to assume the burden of taxation in support of private interests.

It was urged that the enquiry in this case, and upon any motion to quash a by-law on the ground of bribery, &c., should be dealt with as upon a mere scrutiny of votes, irrespective of the question by whom or in whose interest they were bribed; and that if, striking off the bribed votes, there was still a majority in favour of the by-law, it should stand. It will be time enough to consider whether that is the proper construction to be placed on section 325 when a motion is made to quash a by-law under that section. This case may be disposed of, as I have said, on a different principle, on which, if necessary, I would act. But

upon the evidence it is, I think, plain that the passage of this by-law "has been procured through or by means of a violation of the 201st section of the Act," within the literal meaning of those words.

I have no reason to doubt the entire truthfulness of the witnesses, who, apart from their apparent inability to understand the criminality of bribery, appear to be respectable men. The cases proved are those of James O'Donnell, James Crawley, J. W. Rothwell, Edmund Deady, Michael Mansfield, and Johnston Shaw. There were 116 votes for the by-law and 109 against it, so that it was carried by a majority of seven.

O'Donnell and Crawley, though bribed to vote for the by-law, nevertheless voted against it. I cannot deduct their votes in favour of the Railway company, because but for the acts of their agents they would have been good votes. Rothwell, Deady, and Mansfield must be assumed to have voted as they were bribed to vote, namely, for the railway. The first admitted that he did so vote. Deady declined to say how he voted, and Mansfield was unable to remember how he voted. These three votes therefore are to be deducted from the votes given for the by-law, reducing them to 113. But these votes must also be added to the votes given against the by-law, as it is plain from the evidence that but for the bribery they would have been so cast, thus making the vote against the by-law 112. There remains the case of Shaw, who intended to vote against the by-law, but who was bribed on behalf of the applicants to refrain from voting. His vote must be added to the votes against the by-law, thus making a tie.

It is manifest, therefore, that the passage of the by-law was procured to the full extent of the majority by the commission of bribery; and there is too much reason to fear that the cases proved form but a small proportion of the bribery actually committed. I say nothing as to the bribery by treating, and the treating alone. The latter is not directly struck at by the Act, but appears on

the evidence to have been carried to such an extent as to make it difficult to say that there was any fair voting at all.

I think the rule should be discharged, with costs.

Rule discharged, with costs.

IN RE BROCK AND THE CORPORATION OF THE CITY OF TORONTO.

Assessment for sewers—Statutes—Revised Statutes—Repeal—Construction.

Sec. 464, sub-sec. 2, of 36 Vic. ch. 48, enacts that the Council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, &c., of any common sewer, &c., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," &c. This sub-sec. is amended, so far as the same relates to the City of Toronto, by 40 Vic. ch. 39, sec. 2, by inserting after the words "owners of such real property" the words, "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes." 40 Vic. ch. 6, respecting the Revised Statutes, passed in the same Session, repealed 36 Vic. ch. 48; and R. S. O. ch. 74, sec. 551, sub-sec. 2. corresponds with the repealed sec. 464, sub-sec. 2: *Held*, ARMOUR, J., doubting, and CAMERON, J., dissenting, 1. That under 40 Vic. ch. 6, sec. 10, the R. S. O. was substituted for the repealed Acts, and the amending Act applied to the R. S. O. ch. 174. 2. The amendment in 40 Vic. ch. 39, was a reference in a former Act remaining in force to an enactment repealed, and so a reference to the enactment in the revised statutes, corresponding to the sec. 464, sub-sec. 2, within sec. 11 of 40 Vic. ch. 6. 3. That the City of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor.

On the 19th of November, 1879, *F. Arnoldi* obtained a rule *nisi* to quash a by-law of the corporation of Toronto, No. 955, passed on the 22nd day of September, 1879, entitled, "To provide for the construction of a sewer on a lane running parallel with and between Bond and Victoria

streets, from Wilton avenue to Shuter street, in the ward of St. James," on the ground that the said by-law, being a by-law for assessing and levying upon the real property to be immediately benefited by the making of a common sewer, was not petitioned for by two-thirds in number of the owners of the real property, representing one-half the value thereof, and that a majority of such owners opposed the same; and the said by-law was passed in spite of such opposition, and contrary to law, and the said corporation had no grounds to pass the said by-law.

The by-law recited, "That whereas, by the Act 36 Vic., ch. 48, of the Province of Ontario, as amended by the Act 40 Vic. ch. 39, of the said Province, power is given to the municipal council of the corporation of the city of Toronto to make and construct local improvements within the limits of the said municipality, where the same are, in the opinion of the council, necessary for sanitary or drainage purposes, and assess and levy upon the real property, to be immediately benefited thereby, a special rate, sufficient to include a sinking fund, for the repayment of debentures to be issued by the said corporation, to cover the costs of such improvements; and whereas, upon the reports of the city engineer and the committee on works, it is, in the opinion of this council, necessary, for sanitary and drainage purposes, that a common sewer should be constructed, under the provisions of the said Act, on a lane running parallel with and between Bond and Victoria streets, from Wilton avenue to Shuter street." There were further recitals, shewing the property to be benefited, and the cost of the sewer. Then it was enacted, "That the sewer shall be forthwith constructed: that the owners of the real property referred to should, when constructed, cause all the ground and premises, embraced in the description, to be drained into the said sewer, under the direction and to the satisfaction of the city engineer: that debentures be issued under the by-law: that the sum of \$1,035 be raised, by loan, by this corporation, on the security of the special rate by the by-law imposed, and of that rate only: that

the debentures be made payable on the 1st of January, 1900: that the debentures may be made payable at any place in Great Britain, or in this Province: that the owners of the property described may commute the assessment imposed, by paying his or their proportionate charge of the cost thereof, as a principal sum; and that the by-law shall come into operation, and take effect, on the 22nd day of September, A.D. 1879."

February 13, 1880. *McWilliams* shewed cause. It is admitted that the requisite number and value of real property owners did not petition for the by-law, and if that were necessary the by-law is *ultra vires*. The drainage, however, was required for sanitary purposes, and therefore no petition was necessary. This is provided by 40 Vict. ch. 39 sec. secs. 1, 2, 3 and 4. The general Act is R. S. O. ch. 174, sec. 551, subsec. 2. The effect of 40 Vict. ch. 6, is not to repeal 40 Vic. ch. 39. He referred to *Re Michie and the Corporation of Toronto*, 11 C. P. 379; *Re Montgomery and the Township of Raleigh*, 21 C. P. 381; *Re Hill and Walsingham*, 9 U. C. R. 310.

Arnoldi, contra. The law sought to be enforced here is capable of being made a regular engine of oppression, and the Court will not lean in favour of supporting such a law, nor will any intention on the part of the Legislature to perpetuate it be presumed. The cases which necessitated the application for the Act may well have been disposed of between the passing of the Act 40 Vict. ch. 39 and the coming into force of the revised statutes on December 31st, 1877. The corporation take no responsibility, but act practically on the certificate of their engineer, and the parties burdened with the result of their action have no appeal from their determination, no matter how great the injustice or fraud. It cannot be assumed the Legislature meant to perpetuate this. The Act 40 Vict. ch. 39, sec. 2, under which the by-law is enacted, amends sec. 464, subsec. 2, of the Municipal Act of 1873, so far as the same relates to the city of Toronto, by adding after the words,

“owners of such real property,” in the eighth line of subsec. 2, the words, “or where the same is, in the opinion of the said council, necessary for sanitary or drainage purposes.” This is not the same as incorporating the words of the original Act in the amending Act, and a repeal of the original Act is, under these circumstances, a repeal of the whole section, as amended. The effect of amending in this way is to make the added words as if they were enacted in the Acts amended. In any event, the original enactment is repealed, and the amendment standing alone is not sufficient to effect anything; it requires something to operate on, and the whole machinery of the municipal law to give it any force: *Allan v. Great Western R. W. Co.*, 33 U. C. R. 438. The Act 40 Vict. ch. 39, is not a private Act. In any event, sections 1, 2, 3 and 4, are not private enactments so as to exclude the effect of the repealing Act; they merely amend the general municipal law, and all the machinery of that law is required to effect the purposes of the amendment. 36 Vict. ch. 48 is expressly repealed by 40 Vict. ch. 6 sec. 6. Sec. 8 says the repeal shall not prevent the Acts repealed applying to matters prior to repeal, and so confines the operation of section 10. The substitution of the R. S. O. for the Acts repealed (sec. 10) and rendering them declaratory, is conclusive on the question here. The declaration and substitution has relation to 36 Vict. ch. 48, as amended. It is impossible to treat amendments of the original Act applying to R. S. O. ch. 174, of which sec. 551, subsec. 2, applies to similar matters as 36 Vict. ch. 48 sec. 464, subsec. 2. The language is altered by the revision by the insertion of certain words, and if we attempt to apply the amendment made by 40 Vict. ch. 39, sec. 2, to the R. S. O. sec. 551, subsec. 2, we find the clause is made insensible, or, at best, the effect of the amendment intended is nullified. The reading will be: “On the petition of at least two-thirds in number of the owners of such real property, or when the same is, in the opinion of the said council, necessary for sanitary or drainage purposes, representing

one-half the value of such real property," &c. Section 11 of 40 Vic. ch. 6, says that "any reference in any former Act remaining in force, or in any instrument or document," &c., "shall be held to apply to the clauses in the R. S. O., having the same effect," &c. It is submitted that the use of the words "instrument or document," &c., shews that the word reference is confined to its ordinary meaning, and does not include an amendment which could not be made by any other than an "Act," and that at most the word means a quotation or citation, or specific application of the provisions of some prior Act. He further referred to *Dwarris* on Statutes, p. 531; *Dean of Ely v. Bliss*, 5 Beav. 582; *Maxwell* on Statutes, p. 161; *Edmunds v. Hoey*, 35 U. C. R. 495; *Scott v. Great Western R. W. Co.*, 23 C. P. 182.

March 6th, 1880. HAGARTY, C. J.—It was conceded on the argument that this application wholly depends on the effect of the repeal of the Municipal Act of 1873 by the Revised Statutes, ch. 174, the applicant urging that the special Toronto Act, as to a by-law like the present, ceased to have any effect on such repeal.

40 Vic., ch. 39, passed on the 2nd of March, 1877, recites that the corporation of Toronto had petitioned for certain amendments to the Municipal Institutions Act, and to their own Water Works Act. Then

Sec. 1. The 447th section of 36 Vic., ch. 48, "is hereby amended, *so far as the same relates to the city of Toronto*, by inserting after the words, 'describing it,' in the sixth line thereof, the words, 'or where, in the opinion of the council, it is necessary for sanitary or drainage purposes.'"

Sec. 2. "The 464th section of said recited Act is hereby amended, *so far as the same relates to the city of Toronto*, by inserting after the words, 'owners of such real property,' in the eighth line of sub-section two thereof, the words, 'or where the same is, in the opinion of the said Council, necessary for sanitary or drainage purposes.'"

Sec. 3. "Sec. 465 of the said recited Act is amended, *so far as the same relates to the city of Toronto*, by inserting

after the words, 'in that behalf,' occurring in the ninth and tenth lines thereof, the words following, 'or except where the same is, in the opinion of the said council, necessary for sanitary or drainage purposes.'"

Sec. 4. "Sec. 466 of the said recited Act is amended, by inserting after the word 'unless,' in the eighth line of the said section, the words following, 'in any case where such local improvement as aforesaid is, in the opinion of the said council, necessary for sanitary or drainage purposes.'"

The Act contains other provisions as to water and gas works, &c., in Toronto.

The principal Act then in force was that of 1873.

Sec. 447, ch. 48., 36 Vic., in which the words are to be inserted, provides for the passing of a by-law for deepening or draining any stream, creek or water course, in case the majority in number of the owners of property to be benefited petition therefor; with powers of local assessment.

The effect of the insertion is, that in Toronto, if, in the opinion of the council, the improvement is necessary for sanitary or drainage purposes, it may be done without such petition.

Sec. 464 provides for assessing a special rate on the real property to be immediately benefited by the making, &c., of any common sewer, on the petition of at least two-thirds in number, and one-half in value, of the owners.

The words to be inserted give the same power to the Council, if, in their judgment, the improvement be necessary for sanitary or drainage purposes, without such petition.

Sec. 465 declares that no such local improvement shall be undertaken otherwise than on the same petition of the owners.

The insertion of the words gives the same power to the council as last mentioned without such petition.

All these inserted words, *in themselves*, have no special reference to Toronto, but are to be read as in the clauses, so far as they relate to the city of Toronto.

In the same Session, with this special Act as to Toronto, was passed the Act respecting the Revised Statutes of

Ontario, declaring that it had been found expedient to revise, classify, and consolidate, the Public General Statutes of Ontario.

The revised Acts came into force on the 31st December, 1877. The Municipal Act, ch. 174, is professed to consolidate all previous general legislation on that subject.

The Act of 1873 is repealed. There are many changes in arrangement.

The Act of 1873 contained 515 sections; the Revised Act 597. There are no corresponding sections in numbers in the two Acts.

At the foot of each section in the Consolidated Act the section of the Act of 1873, *in pari materiâ*, is added in a parenthesis.

It is argued that, as the special Act for insertion of words is only intelligible or applicable to the Act of 1873, and as the latter has been repealed, the words cannot be inserted in the revised Act. We must see how this can be.

Sec. 529 of the last Act is the same in substance with sec. 447 of the Act of 1873, and at the end refers to that section; and the words directed to be inserted in that section can be readily inserted at the same point, and after the same words, "describing it." The only difference is, that the original direction is after those words, as being in the sixth line, whereas they are now partly in the sixth and seventh lines.

Sec. 464 of 1873 is represented by sec. 551 of the revised Act. It is the same almost in every word; the same subsec. 2, in which the words as to Toronto were to be inserted after the words "of such real property;" the only difference being that they are described as being in the eighth line of the subsection, and they are now partly in the eighth and partly in the ninth lines.

Sec. 465 of 1873 is represented by sec. 552. It is the same, with very trifling verbal differences, not affecting the sense. There are the same words, "in that behalf," after which the words as to Toronto are to be inserted; the only difference being that in the last Act they occur in

the tenth line, instead of in the ninth and tenth lines of the section in the Act of 1873.

Therefore, we have the same sections in fact, with hardly any verbal difference, under different numbers, but providing for precisely the same subjects.

Sec. 551 is expressly for the construction of sewers and levying the rate on the property benefited; to be done on the petition of the two-thirds of owners, &c., *or* (so far as it relates to the City of Toronto), "where the same is in the opinion of the said council necessary for sanitary or drainage purposes," reading into it the words directed by the special Toronto Act of 1877, which stands unrepealed.

Then in the next sec. (552 of Rev. Stat.) is the general prohibitory clause, answering to sec. 465 of 1873, declaring that no such local improvement shall be undertaken by the council otherwise than on the petition of two-thirds of the owners, &c., &c., *or* (so far as Toronto is concerned), "where the same is in the opinion of the said council necessary for sanitary or drainage purposes," reading these words into it as before.

It appears to me that the Act Respecting the Revised Statutes of Ontario (40 Vic. ch. 6,) very clearly provides a guide in a case like the present. Sec. 10 declares that they shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the Acts and parts of Acts repealed and for which they are substituted. The various provisions in the Revised Statutes corresponding to and substituted for the provisions of the Acts so repealed shall, where they are the same in effect as those of the Acts and parts of Acts so repealed, be held to operate retrospectively as well as prospectively, and to have been passed upon the days respectively upon which the Acts and parts of Acts so repealed came into effect.

Sec. 11: "Any reference in any former Act remaining in force, or in any instrument or document, to any Act or enactment so repealed, shall, after the Revised Statutes take effect, be held, as regards any subsequent transaction,

matter, or thing, to be a reference to the enactments in the Revised Statutes having the same effect as such repealed Act or enactment."

This seems exactly to meet the present case. We have, (1). The unrepealed special Act as to Toronto. (2). The references therein to an Act repealed; and (3). The Revised Statute to be referred to as having the same effect as the repealed Act.

For my part, I see no difficulty in the point. No one can imagine that the Legislature intended to, in effect, repeal the provisions of the Toronto Act, nor did they, as they declare, intend to put forth the Revised Statutes as new laws.

I know of no rule of law compelling us to defeat the clear spirit and intention manifested in the course pursued by the Legislature in consolidating the Ontario Statutes.

All the authorities as to the reading and construction of statutes, from the often quoted passage from *Stradling v. Morgan*, Plowden 204, downwards, point, I think, to a reasonable liberality of construction on the part of the Courts in dealing with the statute law, and in striving to overcome any mere technical difficulty in the repeal, re-enactment, or consolidation of statutes.

CAMERON, J.—It was conceded on behalf of the corporation that the by-law was not petitioned for by the requisite number and value of the real property owners affected, and if such petition was necessary, the by-law is bad and *ultra vires*; but it was contended that the sewer provided for was necessary for sanitary purposes, and did not require to be so petitioned for.

The correctness of this contention will depend upon the question whether the amendments made by 40 Vict. ch. 39, secs. 1, 2, 3 and 4, of secs. 447, 464, 465 and 466, of 36 Vict. ch. 48, relating to local improvements, can be imported into and made part of secs. 529, 551, 552 and 553 of ch. 174, R. S. O.

On the 2nd March, 1877, ch. 39 of 40 Vict. was passed. Previous to that Act municipal corporations of cities, towns, and incorporated villages, could not validly pass a

by-law for the purposes of the one in question without a petition therefor from two-thirds in number of the owners representing half the value of the property to be benefited, the number of such owners and the value of the property having been first ascertained and finally determined in the manner and by the means provided by by-law in that behalf.

By the Act 40 Vict. ch. 39, it was enacted, as far as the city of Toronto is concerned, in effect, that where the local improvements were, in the opinion of the council, necessary for sanitary or drainage purposes, the petition of two-thirds of the number of owners of the real property benefited should be dispensed with. The difficulty presented is by the way in which the amendment was made and the repeal of the clauses amended by the Act 40 Vict. ch. 6, from the time the Revised Statutes of Ontario should come into force. The Act does not in terms declare or provide that the council of the city of Toronto shall have power to pass a by-law for a local improvement, necessary in the opinion of the council for sanitary or drainage purposes, without the formalities prescribed by the existing law, but simply that certain sections of the general law shall be amended by the insertion of certain words therein, which would have that effect if the sentences were continued in the revised statutes with the amendments.

By the 2nd sec. of 40 Vic. ch. 6, it is provided, "The Lieutenant-Governor may select such Acts and parts of Acts passed during the present session as he may deem it advisable to incorporate with the said (revised) statutes, and may cause them to be so incorporated therewith, adapting their form and language to those of the said statutes, (but without changing their effect), inserting them in their proper places in the said statutes, striking out of the latter any enactments repealed by or inconsistent with those so incorporated," &c. Though others Acts were selected, this was not.

By sec. 10 it is declared, "The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the

law as contained in the said Acts and parts of Acts so repealed, and for which the Revised Statutes are substituted." Sub-sec. 2. "The various provisions in the Revised Statutes corresponding to and substituted for the provisions of the Acts so repealed, shall, where they are the same in effect as those of the Acts and parts of Acts so repealed, be held to operate retrospectively as well as prospectively, and to have been passed upon the days respectively upon which the Acts and parts of Acts so repealed came into effect." "But," by sub-sec. 3, "if upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail; but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

The Revised Statutes came into force on the 31st day of December, 1877, and if the by-law in question had been passed before that day, as far as the present objection is concerned, it would have been valid. But it was passed after that day, and as the Revised Statutes themselves would not authorize it without the requisites of sec. 552 of ch. 174 of these statutes having been observed, it appears to me it must be held invalid unless the case is covered by and provided for by sec. 11 of the said Act 40 Vic. ch. 6, which is as follows: "Any reference in any former Act remaining in force * * to any Act or enactment so repealed, shall, after the Revised Statutes take effect, be held, as regards any subsequent transaction, matter or thing, to be a reference to the enactments in the Revised Statutes, having the same effect as such repealed Act or enactment." It does not seem to me that the reference here meant would cover or extend to an amendment in fact of a clause in the Revised Statutes substituted for a repealed clause. A reference in an Act, passed prior to the coming into force of the Revised Statutes, to sec. 465 of ch. 48, 36 Vic., would be a reference under that clause to

sec. 552 of the Revised Statutes, but it will not warrant an amendment of that clause. The insertion of the words directed to be inserted would without restrictive words make the amendment apply to all cities, towns, and villages, which clearly was not the intention of the Legislature, and there is no warrant for inserting in the clause any reference to the city of Toronto.

We have then the clear repeal of sec. 465 of 36 Vic. ch. 48, and there is no Act specially relating to the city of Toronto which gives to its municipal council the powers conferred by sec. 552, with the additional power that it had under sec. 465, as amended by 40 Vic. ch. 39, sec. 3.

It appears to me that the words directed to be inserted in secs. 464, 465 and 466 of 36 Vic. ch. 48, giving in themselves no power to pass the by-law, and the words associated with them in these sections having been taken away, we are not at liberty to make an Act of Parliament to meet the case, no matter how strongly we may feel that there has been a legislative oversight^t, and that the Legislature really intended the power to pass such a by-law should be continued to the city of Toronto through its corporation.

I have not been able to find any case in its circumstances exactly like the present; but *Scott v. The Great Western R. W. Co.*, 23 C. P. 182, and *Allan v. The Great Western R. W. Co.*, 33 U. C. R. 483, are somewhat analogous. These cases would be a clear authority for the conclusion I have arrived at, were it not for clause 11 of the Act 40 Vic. ch. 6, above referred to, the construction of which is not free from difficulty in connection with the present matter. My learned brothers do not see the difficulty in the same manner as I do, and their conclusion will perhaps prevent considerable inconvenience to the municipal council of the city of Toronto arising from what appears to me to have been a legislative oversight.

ARMOUR, J., though hesitating, concurred with HAGARTY, C. J.

Rule discharged.

MYKEL V. DOYLE.

Easement—Obstruction—Limitation—R. S. O., ch. 108.

Held, ARMOUR, J., dissenting, that the Ontario Act (R. S. O., ch. 108,) reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way *in alieno solo*, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction.

DECLARATION, setting out the plaintiff's possession of a tenement, and that a certain road or way extended along the rear thereof, and from thence to a street in the town of Belleville, and plaintiff was entitled to a way thereover: breach, that defendant wrongfully obstructed the way by erecting a fence across it.

Pleas:

1. Not guilty.
2. Denial of plaintiff's user.
3. Traverse of the right.

At the trial, at Belleville, before Patterson, J.A., without a jury, it appeared that one Henderson, the owner in fee, laid out a block in the town with the lane or way in question laid out between two ranges of lots, and leading from Front street to Pinnacle street, and he sold all the lots as abutting on the lane.

Plaintiff and defendant held lots under his title abutting on the lane.

Defendant had lots on each side of the lane, and between plaintiff's lot and Pinnacle street.

For some time past defendant had had a shed on part of the lane, and a fence running across from one of his lots to the other.

There was evidence that the plaintiff and others had used the lane previous to defendant's obstructing it.

Defendant objected that plaintiff's title was not proved, which was overruled.

Defendant then offered to prove use and occupation of the lane by him for over ten years.

The learned Judge held that this claim to an easement was not touched by the Statute of Limitations, and rejected the evidence, and entered a verdict for the plaintiff for one shilling damages.

November 20, 1879, *G. D. Dickson* obtained a rule *nisi* for a new trial or nonsuit, on the ground that plaintiff had failed to shew title to the right of way claimed; and for rejection of evidence to shew that defendant had enclosed the land in question, over which the right of way was claimed, as his own for over ten years, and that the plaintiff had not used the right of way claimed for more than twenty years.

November 29, 1879, *Wallbridge*, Q. C., shewed cause. Henderson, the owner of the whole lot, subdivided it, of which plaintiff bought lots one and two, which abut on this lane, and plaintiff claims egress and regress by this lane. Henderson owns the land over which the lane passes, and the plaintiff claims an easement over it and sues defendant for obstructing it. Defendant claims that his obstructing it for ten years is a bar to the action; but it requires twenty years to deprive plaintiff of the easement over it. The easement is not extinguished short of twenty years. The deed is drawn under the Act respecting Short Forms, and sec. 4 of that Act carries the way and easement with it.

Dickson, contra. Plaintiff lost any right he had to the land by the ten years' occupation of defendant, and by the adverse occupation, to the exclusion of plaintiff, of the soil over which the right of way was claimed, for ten years and over. The right of way is an incorporeal hereditament, and the Limitation Act, R. S. O. ch. 108, sec. 1, defines "land" as extending to incorporeal hereditaments, and section 4 limits the time to make an entry or bring any action or suit to recover any land or rent to ten years. The Imperial Act, 3 & 4 Wm. IV., ch. 27, does not extend "land" to incorporeal hereditaments: *Jones on Prescriptions*, 9-16; *Plumb v. McGannon*, 32 U. C. R. 8; *Griffith v. Brown*, 26 Gr. 503; *Gale on Easements*, 628.

March 6, 1880. HAGARTY, C. J.—It seems only necessary to notice the rejected evidence as to over ten years' occupation. As to what is stated in the rule as to twenty years non-user, no such point appears to have been taken at the trial, nor argued before us.

I am of opinion that even if defendant could have shewn an exclusive possession of the lane to the exclusion of the plaintiff and others claiming to have the right to use it, for a period of ten years prior to bringing this action, such a defence would not avail against the right of user.

Consol. Stats. U. C., ch. 88, and our R. S. O. ch. 108, are substantially the same in describing what rights and estates are barred by lapse of time, in the one case, of twenty years, in the other, of ten years.

Both statutes declare that the word "land" shall extend to messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out on the purchase of land, (and to chattels and other personal property transmissible to heirs,) and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency.

The restraining clause is, "No person shall make an entry or distress, or bring any action or suit to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or bring such action or suit, first accrued, &c."

Section 15: "At the determination of the period limited to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, action, or suit respectively might have been brought within such period, shall be extinguished."

This language seems to point wholly to corporeal rights, claims to the land, or rent in specie.

Easements are specially provided for by the Act, R.S. O. ch. 10: see section 34 *et seq.* After providing in section 35 for the case of an enjoyment for twenty years as to ways, &c., and in section 36 for access of light for twenty years, section 37 says that each of these periods shall be deemed and taken to be the period next before some suit or action, wherein the claim or matter to which such period relates, was or is brought in question.

Section 39: "In the several cases * * of claims to lights, ways, watercourses, or other easements, no presumption shall be allowed * * on proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the Act, as is applicable to the case and to the nature of the claim."

The Act then, (section 40 *et seq.*) provides for special exemptions and disabilities in the case of easements, and in section 43 *et seq.* for disabilities in cases of land and rent.

These clauses, 34 *et seq.*, no doubt are pointed at the assertion of right to an easement and not specially to resisting a claim thereto. But the Act seems to my mind irresistibly clear, that a broad distinction is made as to the shortening of the Statute of Limitations from twenty to ten years in the case of the recovery of lands or rents, and the assertion of a right to a way or other easement *in alieno solo*.

The defendant has to shew that if a man fence in and hold the land over which a way is claimed for over ten years, the easement is extinguished.

I agree that a way over Blackacre, as an easement enjoyed with and appurtenant to the possession of Whiteacre, will be barred by whatever bars the right to the possession and ownership of Whiteacre; and this can, of course, be barred by the ten years limitation; in other words, that the way so appurtenant cannot be held or used apart from the possession of Whiteacre.

This would be a case in which the right to "land" might cover and include "Incorporeal hereditaments," in the words of our Prescription Acts.

When the defendant here put a fence or end of a shed on this lane, say eleven years ago, he was not preventing the plaintiff from "making an entry or distress," in the words of the Act, on land which the plaintiff claimed to be his. He was simply obstructing and interfering with a right of the plaintiff, in common with himself, to pass and repass over the land of another.

If we give the late Ontario Limitation Act the effect claimed by defendant, the consequences of such a construction would, I think, be most serious, and beyond the apparent contemplation of the framers of the Act. It would affect a large class of interests in various kinds of easements, as to ways, waters, &c.

Many illustrations might be given, and inconveniences pointed out. The subject is a novel one.

I content myself with holding that the Ontario Act, shortening the period of limitation to ten years, does not apply to the defendant's interruption of plaintiff's right to a way in *alieno solo* for this shortened period.

As to the objection that the plaintiff did not shew title to the easement claimed, we may refer to *Espley v. Wilkes*, L. R. 7 Ex. 298, where the law is very plainly stated.

I also refer to a case of *Leigh v. Jack*, Court of Appeal, Weekly Notes, December 20, 1879, apparently not yet reported in full.

CAMERON, J., concurred.

ARMOUR, J.—The point taken by the defendant in his rule as a ground for nonsuit, that the plaintiff failed to establish any title to the right of way claimed, must, I think, be decided against him.

It is unnecessary to determine whether the right of way passed by force of the very words of the deed from Henderson to the plaintiff, or by implication, for I think the plaintiff became entitled to this right of way by estoppel.

Henderson, having made a plan of his block of land, laying out this way upon it, and dividing the residue into

lots and laying them out abutting on this way, and having registered this plan, and having sold and conveyed to the plaintiff according to the plan, is estopped by such his representation from claiming the way or interfering with it, and the defendant, claiming under Henderson, is in the same position as Henderson in this regard, and thus the plaintiff becomes entitled to the way: see *Harris v. Smith*, 40 U. C. R. 33; *Espley v. Wilkes*, L. R. 7 Ex. 98.

The point taken by the defendant as a ground for a new trial is, that the learned Judge, by and before whom this cause was tried, rejected the evidence tendered by the defendant to shew that the defendant had enclosed the land over which the right of way was claimed for over ten years.

The note made by the learned Judge at the trial is as follows :

“ I ask what the defence is. Dickson says it is the Statute of Limitations, and proposes to prove use and occupation of the lane for over ten years. This action is to try the right to an easement, and is not touched by the Statute of Limitations. I therefore refuse to receive evidence of ten years' occupation. I shall enter a verdict for plaintiff for one shilling damages.”

The question now is, whether the learned Judge was legally right in refusing the evidence tendered.

The Imperial Act 3 & 4 Wm. IV., ch. 27, does not apply to any incorporeal hereditaments except tithes, the interpretation clause thereof providing that the word land therein shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or held according to any tenure.

Accordingly, in England, lapse of time during which there has been a cesser of the enjoyment of a right of way is only evidence from which a release of such a right may be presumed, and there is no period fixed as necessary to elapse before such presumption may be made.

In *Doe v. Hilder*, 2 B. & Ald. 791, Abbott, C. J. says : "One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land : and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may be most reasonably accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed."

In *Moore v. Rawson*, 3 B. & C. 339, Littledale, J., says : "According to the present rule of law a man may acquire a right of way or a right of common (except indeed common appendant) upon the land of another by enjoyment. After twenty years adverse enjoyment the law presumes a grant, made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period, and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user to raise a presumption of a release. And this reasoning, perhaps, may apply to a right of common or of way."

In *Bower v. Hill*, 1 Bing. N. C. 555, Tindal, C. J., says : "The right of the plaintiff to this way is injured if there is any obstruction in its nature permanent. If acquiesced in for twenty years it would become evidence of a renunciation and abandonment of the right of the way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises."

In *Regina v. Chorley*, 12 Q. B. 518, Lord Denman, C. J., says: "The learned Judge appears to have told the jury that no interruption by the public for a shorter period than twenty years would destroy the right. If this were laid down as a rule of law, or even as a conclusive presumption of fact, we think in the former case it was erroneous, and in the latter would be likely to mislead the jury, as turning their attention to a definite period of time as the ground for decision, when time might in truth be wholly immaterial, or only in part material * * The learned Judge appears to have proceeded on the ground that as twenty years user, in the absence of an express grant, would have been necessary for the acquisition of the right, so twenty years cesser of the use, in the absence of any express release, was necessary for its loss. But we apprehend that, as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act indicative of an intention to abandon the right, would have the same effect without any reference to time * * It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances. This is the principle on which the judgments of all the members of this Court proceeded in *Moore v. Rawson*, 3 B. & C. 332, and which was adopted in *Liggins v. Inge*, 7 Bing. 682, 693. It is true that these cases were cases between two individuals, and not between the public and one individual; but that can make no difference."

See *Crossley v. Lightowler*, L. R. 2 Chy. 478.

I think that, on the authority of *Regina v. Chorley*, the learned Judge was wrong in refusing to hear proof to over

ten years' use and occupation by the defendant of the lane or way claimed by the plaintiff.

In my opinion the learned Judge ought to have allowed the defendant to prove such use and occupation and the facts and circumstances attending it, and then he and we would have been able to determine from such evidence whether the presumption of a release by the plaintiff of this way arose.

As it is, the defendant was not allowed to go into any proof at all at the trial, and it is impossible, therefore, to conclude what would have been the result of his proof if given.

If, however, the defendant had shewn at the trial over ten years' use and occupation by him of the land over which the way is claimed, as he proposed to do, meaning, as I take it, to shew over ten years actual and continuous exclusion by him of the plaintiff from the use of the way, I think the plaintiff's right to the way would have thereby been extinguished.

The interpretation clause of 4 Wm. IV., ch. 1, now R. S. O., ch. 108, sec. 1, enacts that "the word land shall extend to messuages and all other hereditaments, whether corporeal or incorporeal." It cannot be denied that the right of way claimed is an incorporeal hereditament, and is covered by the very words of the interpretation of the word land, and I can see no good reason why it should be held that the Act does not apply to the right of way claimed.

It is stated that an entry cannot be made with respect to a right of way, and that an action cannot be brought to recover it. I do not see why an entry cannot be made upon a way for the purpose of using it as well as upon land for the purpose of taking possession of it; and I think an action brought for obstructing a right of way is in effect an action brought to recover it.

I see nothing in the various enactments of our Statute of Limitations to prevent its interpretation clause being read according to its very words, and I think the framers of it

designed that it should extend to just such a way as is here claimed.

The framers of our Act had before them the Imperial Act, and our Act, so far as it does enact, is almost a transcript of it, except in this very interpretation clause.

There is no good reason why the same limitation should not apply to the recovery of a right of way as applies to the recovery of the land over which it is.

I think the rule should be absolute for a new trial, without costs.

Rule discharged.

DUNLOP V. THE CANADA CENTRAL RAILWAY COMPANY.

R. W.'s and R. W. Co.'s—Deed by part owner of land—Infants' interest barred—31 Vic. ch. 68, D.

The mother of infant children, resident with her, being entitled to a third undivided interest in the land, they owning the residue, by deed agreed with a railway company, in consideration of an extension by them of their line of railway from R. to P., and for \$1, to grant to them in fee the right of way "through my land in P., consisting of such portion of lots 18 and 19 as may be required to carry the railway across said lots," and conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children: *Held*, that under the Railway Act of 1868, (31 Vic. ch. 68, sec. 9, sub-secs. 3, 9, D.,) her deed barred the children's interest in the land as well as her own, and that they were not therefore entitled to compensation from the company.

On the 17th November, 1879, a mandamus *nisi* was issued out of this Court directed to the defendants, commanding them forthwith to appoint some person as arbitrator on their behalf to assess the compensation to be paid by them to Alice Lavinia Dunlop, James Dunlop, Ida May Dunlop, David Alexander Dunlop, and Edith Irene Dunlop, infants, and Elizabeth Dunlop, guardian of said infants, on account of and for damages for the portion

of lot number nineteen, in the second concession of the township of Pembroke, in the county of Renfrew, which had been appropriated by the defendants pursuant to the Railway Act of 1868, or to shew cause to the contrary.

The defendants returned to the said writ that their railway from the village of Renfrew, in the county of Renfrew, to the town of Pembroke, in said county, passed through and over a portion of said lot 19, in 2nd concession of Pembroke, in said county, being the lot and the portion thereof in said writ mentioned, and that before and at the time of making the agreement and deed hereinafter mentioned, "The Railway Act of 1868," from section 5 to section 20, applied to said railway, and said company were in great measure induced to build said railway by the promises of persons owning lands through which same was to pass, that a free right of way would be given to said company through the said lands for their said railway, and said lot 19 had been increased in value by reason of the construction of said railway; and said Dunlops, in said writ named, were the children of said Elizabeth Dunlop, in said writ named, and of one Armah Hyde Dunlop, her husband, deceased, before the making of the agreement afterwards mentioned, and before and at the time of the making of said agreement and deed; and said Elizabeth Dunlop continued owner in fee of three undivided one-eighth parts, shares and interest of and in said lot 19, and said five children, the owners in fee of the other five undivided one-eighth part, shares and interest, but subject, as to all the said persons, to their right acquired by said company in and to said portion of the said lot, and that all said persons were such owners as tenants in common; and said five children, before and at the time of the making of said agreement, and from thence and until after the completion of said railway, were all infants under the age of twenty-one years, and during all that time resided with their said mother, upon said lot; and said Elizabeth Dunlop during all that time was in possession of said lot, and during all or any part of said time there was no guardian of said

children, or of any or either of them, other than the said Elizabeth Dunlop; and thereupon, and before the construction of said railway, and before said portion of said lot had been appropriated by said company, it was agreed between said Elizabeth Dunlop and said company that the construction of the said railway from said village of Renfrew, to said town of Pembroke, and from thence to the Ottawa river, within the limits of the village of Pembroke, and the nominal sum of one dollar, should be the compensation for the portion of said lot required to carry said railway through said lot towards the Ottawa River, and for any damage to said lot caused by the construction of said railway, or by reason of said company taking possession of or using said portion of said lot, save and except that if said railway should run through buildings of any description, then said company should pay a fair and reasonable price for the same; and said Elizabeth Dunlop, thereupon, and immediately upon the making of said agreement, made and executed her certain deed, as follows:

"I, Elizabeth Dunlop, of the township of Pembroke, in the county of Renfrew, for and in consideration of the Canada Central Railway Company extending their line of railway from the village of Renfrew, in the county of Renfrew, to the town of Pembroke, in the said county, and from thence to the Ottawa river within the limits of the corporation of the village of Pembroke, and for the further consideration of the sum of one dollar, the receipt whereof I do hereby acknowledge, do hereby for myself, my heirs, executors, administrators and assigns, agree to and with the Canada Central Railway Company to grant, by sufficient deed or deeds in fee simple, free from all incumbrances whatsoever, whenever required so to do, the right of way to the said Canada Central Railway Company for their said line through my land towards the Ottawa river, in the corporation of Pembroke aforesaid, free from further charge, said land consisting of such portions of lots Nos. 18 and 19 in the second concession of the said township of Pembroke as may be required to carry said railway across said lots; provided always that if said line of railway runs through buildings of any description, that then said company shall pay to me a fair and reasonable price, to be

agreed upon between said company and myself, or according to the statutes in that behalf, in case of disagreement, the breadth of the line of railway not to be more than ninety feet."

The return then proceeded to state that said Elizabeth Dunlop thereupon, and after the execution of said deed, empowered said company to enter upon, and gave them possession of that portion of said lot occupied by said company for their said railway; and said agreement and said deed, and the agreement expressed in said deed, were all made in good faith, and said company had always been ready and willing to perform and observe said agreement, &c. And said company submitted that upon and under the facts and circumstances aforesaid, the compensation in said writ mentioned had been ascertained, and also that upon and under the said facts and circumstances they were not bound or required, nor was it their duty to appoint an arbitrator as in said writ asked or directed.

Demurrer.

1. That the agreement set forth in the return is not sufficient to deprive the owners of the land before the agreement was made of their rights therein, there being no money compensation, or at least but a nominal consideration agreed to be paid for the land.

2. That there being infants interested in the land, the agreement set forth does not deprive them of their rights in the land or to convey the same.

3. That in a case of this nature the railway company were bound, before taking possession of the land, to have acquired the right or title of the infants from the executor or administrator of Armah Hyde Dunlop.

4. That the agreement set forth does not convey more than the interest of Elizabeth Dunlop in the land conveyed, and does not profess to convey the interest of the applicants named in said writ.

February 9, 1880. *Read*, Q. C., for the demurrer. The whole question arises upon the construction of the Statute

31 Vict. ch. 68, D. The material portions of the Act are sec. 9, sub-secs. 3, 9, 11, 12, *b*. The statute contemplates the case of adults only; it does not refer to minors, but to those only who are capable of contracting; and it must be strictly construed. He referred to *Shelford* on Railways, 4th ed., II. 232, 233; *Earl of Harrington v. Metropolitan R. W. Co.*, 13 L. T. N. S. 583; *Robbins v. Milwaukee R. W. Co.*, 6 Wis. 636; *In re Benson and Port Hope, Lindsay, and Beaverton R. W. Co.*, 29 U. C. R. 529.

Richards, Q. C., contra. The owner of the third interest can affect all others in the same interest: see sec. 9 of the Act referred to. Elizabeth Dunlop had the right, as such owner of a third interest, to deal with the land, and therefore she had the right to say that the compensation for the grant shall be the building of the railway, and such agreement on her part was binding upon all parties interested.

March 6, 1880. HAGARTY, C. J.—The facts are simple.

Elizabeth Dunlop owned over a third undivided interest in lot 19, second concession of Pembroke, and her five infant children owned the residue.

By deed of 29th July 1875, she agreed with defendants, in consideration of their extending their line from Renfrew to Pembroke, and for the further consideration of \$1, to grant to them in fee simple, free from all incumbrances, whenever required, "the right of way through my land," &c., consisting of such portions of lots 18 and 19 in second concession Pembroke, as may be required to carry the railway across said lots, provided that if the line ran through any buildings the company should pay her a fair and reasonable price according to the statute.

Her children then resided with her, and all is admitted to have been done in good faith. The company took possession, and have built the road across the land to the statutable width, not touching any buildings.

These facts are returned to a *mandamus nisi*, commanding the company to have compensation assessed, to

be paid to these infant children and Elizabeth Dunlop, their guardian.

The point raised is, whether the infants are or are not entitled to compensation.

The case is admitted to be governed by the Railway Act of 1868 (31 Vict. ch. 68, D).

Sec. 9, sub-sec. 3, is: "All corporations and persons whatever, tenants in tail or for life, guardians, curators, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femmes covert*, or other persons seised, possessed of, or interested in any lands, may contract, sell, or convey unto the company all or any part thereof."

Sub-sec. 9: "Whenever there is more than one party proprietor of any land as joint tenant or tenants in common, or *par indivis*, any contract or agreement made in good faith with any party or parties, proprietor, or being together proprietors of one-third or more of such land, as to the amount of compensation for the same or for any damages thereto, shall be binding as between the remaining proprietor or proprietors as joint tenants or tenants in common and *par indivis*; and the proprietor or proprietors who have so agreed may deliver possession of such land, or empower the entry upon the same, as the case may be."

When Mrs. Dunlop made the conveyance, she had not been appointed guardian of the children.

It appears to us that the statute has given the joint tenant, or tenant in common, to the extent of one-third undivided interest, the power to bar all the estate of the other tenants by a sale made in good faith.

The only doubt that could suggest itself would be, whether they intended to bar the estate of an infant as well as of a person *sui juris*.

But they certainly enable a joint tenant to bar and defeat the estate of his two co-tenants, one of whom may be in Australia and the other at the Cape.

In such a case these co-tenants would be as helpless as infant children.

We must assume that the Legislature advisedly barred all the estates of infants, lunatics, absentees, &c., so long as there was one co-tenant, to the extent of one-third undivided interest, competent and willing to treat with and convey to the railway company. Here, if the widow had been appointed guardian, she could have bound the infants under sub-sec. 3.

In the present case it is more than probable that no very serious injury has been done to these infants by enabling their mother, in good faith, to make this arrangement.

As the Act is worded, we do not see there is any substantial objection to the mother's deed that she speaks of the land as her land, and does not profess to deal with any interest but her own.

ARMOUR and CAMERON, JJ., concurred.

Judgment for defendants on demurrer.

CANADIAN BANK OF COMMERCE V. GREEN ET AL.

Principal and surety—Negligence of creditor—Discharge of surety.

Defendants were maker and endorser respectively of a promissory note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts.

On the maturity of the note plaintiffs handed it to D., who was their solicitor, for protest. D. did not protest or notify defendants of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the non-payment of the note.

In an action against defendants on the note they pleaded, on equitable grounds, the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that if compelled to pay the note, they would be defrauded out of the amount: *Held*, a good defence, and that the defendants were discharged.

DECLARATION: on a promissory note for \$400, made by defendant Green to defendant Lewis, and by Lewis endorsed to plaintiffs.

Pleas.

8. On equitable grounds: that prior to the making of the note sued on defendant Green made a note for \$400 in favour of one D. T. Duncombe and for his accommodation, and that defendant Lewis endorsed the note for Duncombe's accommodation, and that Duncombe endorsed this note to the plaintiffs, and promised to pay the note himself, and to save harmless the defendants in respect thereof, and the plaintiffs had notice of these facts; but the said note was not paid at maturity: that the defendant Green afterwards made, and the defendant Lewis endorsed, for the accommodation of said Duncombe, without consideration, the note sued on, as a renewal of the note first mentioned, said Duncombe promising to pay the same and save harmless the defendants: that said note was not paid at maturity, whereupon the plaintiffs placed the same in the hands of the said Duncombe, as the solicitor of said plaintiffs, for protest: that said Duncombe retained the said note a long time, with the knowledge of plaintiffs, and afterwards handed it over to defendants, saying that it had been paid,

and defendants now hold the same : that, relying on said representation, and the delivery up of said note, defendants made no effort to procure payment of said note by Duncombe : that no demand was made upon them by plaintiffs for payment of the same, nor did they know that the same remained unpaid, but they always believed that it had been paid until after said Duncombe's absconding from Ontario, which took place about three months after the maturity of the said note : that plaintiffs, by their conduct in allowing the said note to remain for so long a time in the hands of Duncombe, and in allowing him to hand over the same to defendants, placed it in his power to perpetrate a fraud, as he did, upon defendants, and prevented defendants from enforcing payment from Duncombe ; and the plaintiffs had notice of the fact that the note was an accommodation note, and that defendant Green was an accommodation maker, and defendant Lewis an accommodation endorser, and only sureties for said Duncombe on the note. Averment : that said note never was presented for payment *nor protested*, and defendants had no notice of its non-payment until several months after the maturity thereof, and after Duncombe had absconded, and had they had notice of the non-payment at maturity within a reasonable time thereafter they could have obtained indemnity from Duncombe ; but plaintiffs' laches put it out of defendants' power to obtain indemnity, and if defendants were compelled to pay the note they would be defrauded out of the money.

9. On equitable grounds, by defendant Green : that Duncombe, wishing to obtain a loan from the Bank of Commerce, defendants, at his request and plaintiffs' request, agreed to become his sureties to the plaintiffs, the Bank, and Green made and Lewis endorsed a certain note, dated 10th May, A.D. 1879, for the purpose of becoming such co-sureties for the said Duncombe, and for his accommodation, and for no other purpose or consideration, and the plaintiffs became the holders of said promissory note and always held the same with full knowledge of all the facts ; and that, upon matu-

urity, the note was renewed by the note in the declaration mentioned : that said Duncombe promised the defendants that he would pay said note at maturity, as plaintiffs well knew; yet plaintiffs, being the holders, neglected to present said note for payment, or to give notice of dishonour to defendants, or either of them, whereby the endorser was wholly discharged from liability as such endorser; and plaintiffs allowed Duncombe to give up the said note to defendants, and Duncombe said he had paid said debt for which plaintiffs held said note as security, and that defendants were discharged therefrom, in proof of which he gave up said note to defendants; and defendant Green, relying upon said statement, took no steps to recover the amount of said note from Duncombe; and that Duncombe absconded and left no property, after which said defendants were first informed of said plaintiffs' claim that the debt was unpaid: and that had notice been given within a reasonable time to defendants they could have procured indemnity from said Duncombe; and by plaintiffs' laches defendant Green submitted that he was discharged.

Demurrer :

1. The said pleas confess without avoiding the plaintiffs' claim.

2. It does not appear by the said pleas that there was any binding contract to give time to D. F. Duncombe, alleged to be the principal debtor, or that there was any consideration for the forbearance by plaintiffs to enforce their claims against him : that what is set up by said pleas is merely a forbearance or indulgence to the principal debtor, which is insufficient to discharge the sureties.

3. The said 8th plea alleges want of presentment and notice of dishonor, which, if true, would constitute a defence as to the defendant Lewis, the endorser; but the said plea is pleaded by both defendants and is no defence to the defendant Green, the maker of the note sued on, either at law or in equity.

4. The said 9th plea discloses no facts entitling the defendant Green, by whom alone it is pleaded, to any relief in equity.

February 24, 1880. *Creelman*, before Cameron, J., sitting alone, for the demurrer. The pleas do not disclose that the plaintiffs had notice when they discounted the note sued on, or at the time the note was handed out to Duncombe, that the defendants were accommodation maker and endorser respectively, although they had such notice in respect of the note of which the note sued on was a renewal, and therefore the defendants are principals, so far as the bank is concerned, and the case cannot consequently be affected by any of the rules relating to principal and surety. Even if the plaintiffs knew that the defendants had given the note for the accommodation of Duncombe, yet the pleas do not disclose such acts on the part of the plaintiffs as in a court of equity entitle a surety to a release. The note was given to Duncombe as agent of the bank, *for protest*, not for any other purpose., Duncombe was not the agent of the bank, and his representation that the note was paid, and his action in giving it up to the defendants, constituted a fraud upon the plaintiffs, and being also in excess of his authority, were not and would not be the representations of the principal (the plaintiffs), or binding upon them; in other words, the representations made by Duncombe to the defendants were made in the capacity of principal to the defendants, and not in the capacity of agent to the plaintiffs. The defendants being primarily liable on the note, and Duncombe not being a party to the note, were guilty of laches in not ascertaining from their principal debtors (the plaintiffs) whether or not the note had been paid; in other words, they lent themselves to the fraudulent scheme of defrauding the plaintiffs. The defendants were not, under the circumstances, justified in taking the word of Duncombe that he had paid the note, although it was accompanied by the note itself, they being aware that he was the notary of the bank, and would in the ordinary course of business, be handed the note for the purpose of protest, if not paid. At the utmost, the pleas amount to the defence that time had been given to the principal, or rather that the plain-

tiffs had forbore to sue; but that is no defence, because the authorities are conclusive that the promise to forbear must be by a binding contract supported by a consideration, which essential is absent in this case. So much of the 9th plea as alleges that defendant Green is discharged from liability by reason of want of presentment and protest, or notice of dishonor, is clearly bad, he being the maker of the note.

Spencer, contra. The misusing or losing any security for the debt held by the creditor discharges the surety: *Pearl v. Deacon*, 24 Beav. 186. Where a creditor takes a bill of sale as well as security for the debt, and omits to register or take possession under the bill of sale, whereby the security is lost, the surety is discharged: *Wulf v. Jay*, L. R. 7 Q. B. 756, 762. Here the laches of the plaintiffs discharged both sureties. They both delivered up the security and delayed giving notice until after Duncombe absconded.

He also referred to *Bailey v. Edwards*, 4 B. & S. 770; *Strange v. Fooks*, 4 Giff. 408; *Pooley v. Harradine*, 7 E. & B. 431; *Oakley v. Pasheller*, 4 Cl. & F. 207.

March 2, 1880. CAMERON, J.—The defendants are entitled to judgment on both pleas, which shew that both defendants stood in the position of sureties merely to the plaintiffs for one Duncombe: that the plaintiffs, with knowledge of this, permitted Duncombe, who was their solicitor, to receive into his possession the note, and thereby enabled him to deceive the defendants by surrendering it to them as if it had been paid.

Where a creditor allows a surety to believe that the principal has discharged the obligation in respect of which the surety is bound, though he is mistaken and has acted in good faith, he nevertheless thereby discharges the surety. I can see no distinction in principle between such a case and the present. Duncombe was the principal debtor and bound to pay the note, and the plaintiffs, with knowledge of this, allow him to have the possession and apparent control of

it. While so in possession of it, he delivers it up to the defendants. Surely this was as much actively misleading the defendants as a declaration, on the part of the agent of the bank, made under the erroneous belief of its truth, would have been, that Duncombe had paid, when in fact he had not. The mischief to the sureties would be the same in both cases, and in both would result from the carelessness of the creditor.

Judgment for defendants on demurrer.

SMITH V. THE CORPORATION OF ANCASTER TOWNSHIP.

Chose in action—Assignment—R. S. O. ch. 116, sec. 9—Pleading.

Declaration, that D. by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, &c , &c. : *Held*, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law.

Mitchell v. Goodall, 44 U. C. R. 398, and *Brice v. Bannister*, L. R. 3 Q. B. D. 569, distinguished.

The second count stated that D., being largely indebted to plaintiff, and being pressed by him for payment, it was agreed that D. should assign to plaintiff, to secure part of said debt, \$500 due and to become due to D. by defendants for work done by D. : that D. gave plaintiff an order upon defendants to pay same to plaintiff : that plaintiff notified defendants, who represented to plaintiff that if he would present said order as soon as they had examined said work, which would be before December, 1879, they would pay the \$500 to him : that by said representation plaintiff was prevented from proceeding against D. to recover said \$500 : that afterwards and before said December defendants, being liable to pay said sum, and well knowing that plaintiff, relying on said representation, refrained from such proceedings, paid the same over to D., in fraud of plaintiff, and defendants thereafter wrongfully refused to pay same to plaintiff : *Held*, good, as disclosing a cause of action upon an assignment of a debt due by defendants to D. for work and labour performed for them by D., and a promise on their part to plaintiff to pay such debt.

The count having been drawn so as to invite a demurrer, the demurrer was overruled without costs.

DECLARATION: For that one David Daniels, by writing, for valuable consideration, duly assigned to the plaintiff the sum of \$500, money due and to become due to said

Daniels by the defendants, whereof the defendants had forthwith thereafter due notice in writing, and at the time of and after the said assignment, and after the said notice to the said defendants, and before action, the defendants were indebted to said Daniels in money sufficient to pay the sum so assigned to the plaintiff, and the plaintiff thereafter and before action demanded from the defendants payment of the sum so assigned, but the defendants refused to pay the same, or any part thereof.

And for that one David Daniels, being largely indebted to the plaintiff, and being pressed by the plaintiff for payment, it was agreed by and between the plaintiff and said Daniels, that said Daniels should assign to the plaintiff, to secure part of said indebtedness, \$500 due and to become due to him by the defendants for work done by said Daniels in building a plank road in the said township of Ancaster: that thereupon the said Daniels gave the plaintiff an order on the said defendants to pay said \$500 to the plaintiff: that the plaintiff thereupon notified the defendants of the said order, in writing as well as verbally, and the defendants represented to the plaintiff that if he would present the said order to them as soon as they had examined the said road, which would be before the month of December, A.D. 1879, they would pay the said \$500 to him: that by the said representation of the defendants the plaintiff was prevented and dissuaded from taking legal proceedings against the said Daniels, whereby he might recover the said \$500: that after the said representation by the defendants, and before the said month of December, the defendants, being indebted to and liable to pay the same for the said work done by the said Daniels, and well knowing that the plaintiff, relying on their said representation, refrained from taking proceedings to recover the said \$500, paid the same over to and for the benefit of said Daniels, but not to the plaintiff, in fraud of the plaintiff, and the defendants thereafter wrongfully refused to pay the same, or any part thereof, to the plaintiff.

Demurrer: 1. The said first count states an assignment

of a claim to the plaintiff, but does not disclose the cause of action against the defendants.

2. The said count does not state upon what indebtedness the defendants are sued.

1. That the said second count does not set forth any indebtedness on the part of the defendants.

2. That the said count alleges that the said moneys were to be paid upon presentation of the order, after the defendants had examined the road, but it does not allege that the said order was presented after examination of the road.

3. The said count is partly in tort, partly in contract.

4. The representations in the said count alleged are not binding on the defendants' corporation from anything appearing in the said count, and it does not appear thereby that the defendants changed their position or lost by acting thereupon.

March 2, 1880. *Boyd*, Q. C., for the plaintiff, before Osler, J., sitting alone. For some remarks on the modern rules of pleading see *Hogan v. Aikman*, 30 U. C. R. 22. See, also, *Redway v. McAndrew*, L. R. 9 Q. B. 74. The demurrer admits that money was due: *Grant v. Eddy*, 21 Gr. 568. There was a promise to pay: *Riccard v. Pritchard*, 1 K. & J. 277. He also cited *Mitchell v. Goodall*, 44 U. C. R. 398; *Brice v. Bannister*, L. R. 3 Q. B., D., 569.

Osler, contra. The count is one in deceit. The assignment is not conditional: *Hostrouser v. Robertson*, 23 C. P. 350. It is not an equitable assignment—it is a mere cheque. The count is only maintainable on the ground of deceit or estoppel. There is nothing shewn which would prevent the plaintiff suing Daniels, or that he has lost anything by not doing so. Presentment of the order and refusal, of it was not alleged.

March 12th, 1880. OSLER, J.—According to our present system of pleading, the first count in the declaration is, in my opinion, bad.

The plaintiff sues as the assignee of a *chose in action*, and by section 9 of the Mercantile (Law) Amendment Act, R. S. O., ch. 116, it is required that he shall set forth the assignment under which he claims, but that the pleadings and proceedings in the action shall be, in all other respects, the same as if the action had been instituted in the name of the original party, or first assignor. Unless, therefore, a contract "for money due from the defendant to the plaintiff" would be good without stating any fact from which the existence of and promise to pay a debt would be implied by law, *e. g.*, money had and received by the defendant for the use of the plaintiff, goods sold and delivered, money lent, &c., the present count must be defective.

Mitchell v. Goodall, 44 U. C. R. 398 was relied upon in support of the count. But, besides that there was no demurrer, the first count in that case contained the further statement that the money assigned was money due to the assignor "in the hands of the defendant," which might not unfairly be read, if necessary, as an allegation of money had and received by the defendant for the use of the assignor. And in that case, and in *Brice v. Bannister*, L. R. 3 Q. B., D., 569, also cited and relied upon, there was the further allegation that the defendant accepted the order or assignment, which, though not necessary to complete the plaintiff's equitable title as assignee of a *chose in action*, might be read as an averment of an express promise by the debtor to pay the assignee. *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Hogan v. Aikman*, 30 U. C. R. 22, and *Redway v. McAndrew*, L. R. 9 Q. B. 74, do not apply, for in those cases facts were stated which, upon the trial, might support the plaintiff's contention.

As to the second count, slovenly and unsatisfactory as it is, I have come to the conclusion that it discloses a cause of action, viz., upon an assignment of the debt due by the defendants to Daniels, for work and labour performed for them by him, and, in another aspect, upon their promise to the plaintiff to pay such debt. It is not necessarily to be

inferred that the money was not in fact due and payable before the examination of the work by the defendants, and the averments that they paid the debt to the assignor after notice to the plaintiff, and before the month of December, and thereafter refused to pay it to the plaintiff, can be read, and, I think, ought to be read, as shewing a dispensation or waiver of the examination of the work, if that was in any sense a condition precedent to payment, and of a demand and refusal after the time when, according to the alleged "representation" of the defendants, the money would be payable. It was objected, *ore tenus*, that an absolute assignment of a *chose in action* was not shewn, because the debt was said to have been assigned to *secure* part of the indebtedness of Daniells to the plaintiff. I do not think, however, that this expression necessarily excludes the idea of an absolute assignment, and the case of *Hostrouser v. Robinson*, 23 C. P. 350, does not support the objection. In that case a larger debt was assigned as collateral security for the payment of a smaller one, and the form of the assignment shewed very clearly that the assignor retained the principal interest. See, also, *Dawson v. Graham*, 41 U. C. R. 532.

I decide it simply on the point of pleading; the evidence may disclose further facts which may shew that the plaintiff cannot maintain the action in his own name.

The count has been drawn so as to invite a demurrer, and in overruling the demurrer thereto I do so without costs. Judgment for the defendant on demurrer to the first count, with leave to amend as advised, on payment of costs; judgment for the plaintiffs, without costs, on the demurrer to the 3rd count, and leave to the defendant to plead thereto, if necessary, within a week, without costs.

Judgment accordingly.

REGINA V. DAVIDSON ET AL.

Trespass to land—32-33 Vic. ch. 22, sec. 60—Title to land—Quashing conviction.

Where the defendants had been convicted, under 32-33 Vic. ch. 22, sec. 60, of trespass to land, and it appeared on the evidence before the magistrate, set out below, that there was a dispute between the parties as to the ownership, *Held*, that it was a case in which the title to land came in question, and that the defendants had been improperly convicted, even though the magistrate did not believe that the defendants had a title, it not being within his province to decide on the title, but merely on the good faith of the parties alleging it.

February 23, 1880. *Holman* obtained a rule *nisi* calling upon the complainant, John Poole, and the convicting magistrate, David John Walker, to shew cause why a conviction made by the latter, which had been removed by *certiorari* into this Court, should not be quashed, on the ground that the said magistrate had no jurisdiction, or that his jurisdiction was ousted, in that the title to land came into question, or that there was such a *bonâ fide* claim or dispute as to the property as put an end to his jurisdiction to enquire further in the matter. The summons charged the defendant with having, "at Storrington, on or about the 8th day of July, unlawfully cut hay or grass growing upon the north half of lot No. 17, in 14th concession of Storrington, the property of deponent." The complainant stated that he, and others, under whom he claimed, "had been in possession of the north part of lot 17, in 14th concession of Storrington, for the last twenty-five years. I mean different members of my family, and, directly, myself have been in possession of the said north part about four years. About three years ago the man I had working for me on the lot told me Mr. Davidson forbid him to work." He then stated that the defendant committed the trespass complained of.

The defendant stated that the complainant did not own the north part, and claimed that his wife's deed covered the whole of lot 17, except the north 50 acres.

The further facts are stated in the judgment.

March 9, 1880. *Robinson*, Q. C., shewed cause, before Galt, J., sitting alone. The conviction was under 32-33 Vic. ch. 22 sec. 60, D. The magistrate is the judge whether the claim of title is *bonâ fide* or a mere pretence, and the evidence must shew that the claim is not only *bona fide*, but made on reasonable grounds: *Paley* on Convictions, 6th ed., p. 153. He referred also to *Regina v. Taylor*, 8 U. C. R. 257; *Cornwell v. Sanders*, 3 B. & S. 206; *Legg v. Pardoe*, 9 C. B. N. S. 289; *Pease v. Chaytor* 3 B. & S. 620; *Regina v. Nunneley*, 8 E. B. & E. 852; *Regina v. Cridland*, 7 E. & B. 853; *Regina v. Pedler*, 5 N. R. 81. Here the defendant asserted title in his wife, but neither produced any evidence nor asked for an adjournment to procure it, and the magistrate was justified in disregarding his mere statement.

J. K. Kerr, Q.C., contra. If the evidence shewed that the party acted on the fair and reasonable belief that he had a title to the land he should not have proceeded. The defendant should not have been subjected to a summary conviction: *Regina v. Taylor*, 8 U. C. R. 257. The defendant claimed that he had a paper title; the plaintiff that he had a title by possession. There was evidence that defendant acted under a fair and reasonable belief that he had a right to do the act complained of, and the magistrate was bound not to proceed with the case: *Charter v. Greame*, 13 Q. B. 216; *Paley* on Convictions, 6th ed., pp. 152, 137, 420, 452. The Court will look behind the evidence before the magistrate.

March 12, 1880. GALT, J.—The conviction was under the Statute 32-33 Vict. ch. 22 sec. 60, D. The section contains a proviso "that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of." It is perfectly plain to me, from the evidence before the magistrate, that the dispute between the parties was as to the boundary between the north 50 acres and the other part of the lot, and I cannot understand how the

magistrate considered himself entitled to proceed in the case. It is true he says, in an affidavit filed on the return of the *certiorari*, "he did assert title in his wife, but I placed no weight on his evidence;" but this opinion will not give him jurisdiction; it is not sufficient for him to say he does not believe the defendant has title: he has no right to try whether he has or not. This was a case in which the title to land came in question. The latest case I have found on the subject is *Regina v. Stimpson*, 4 B. & S. 301, where most of the cases referred to by Mr. Robinson are cited. Blackburn, J., says: "The general rule of law applicable to justices exercising summary jurisdiction is, that they are not to convict where a real question as to the right to property is raised between the parties; then their jurisdiction ceases, and the question of right must be settled by a higher tribunal; for the justices, by convicting, would be settling a question of property, conclusively and without remedy, if their decision happened to be wrong."

It was in evidence before the magistrate that the defendant in the present case had had a survey made of the lot, had paid the taxes on it, and had forbidden the complainant to enter on it. The complainant was present and did not contradict any of these statements. It appears to me there could hardly be a stronger claim.

In *Cornwell v. Sanders*, 3 B. & S. 206, the Chief Justice says: "When the party charged asserts title in himself, though the title be only colourable, yet if the assertion be made *bona fide*, the jurisdiction of the Justices falls to the ground. There must, however, be some colour or show of reason for the claim." In my opinion there was strong ground to believe that the defendant had reason for his claim, and the mistake the magistrate has made is in deciding on the title itself, and not on the good faith of the defendant in alleging it.

I have decided this case on the evidence before the magistrate alone. A reference to the affidavits and papers filed on this application will shew that *beyond doubt* the magistrate had no jurisdiction.

COWLING v. DIXON.

Landlord and tenant—Covenant to deliver possession on notice of sale—False representation of sale—Non-delivery of possession—Right of action.

Defendant leased a farm to the plaintiff, with a covenant in the lease that in case of a sale of the premises, the plaintiff, upon receiving six months notice thereof, and compensation for all labour expended thereon to the date of the notice, would deliver up the premises to defendant at the end of the six months, the compensation being so fully paid. Defendant notified the plaintiff that a sale had been made, which was untrue, on which plaintiff refrained from putting in a crop in fallow prepared for it, and from doing other work; but having subsequently come to the conclusion that there had been in fact no sale, he decided to remain in possession, and did so, delivering no bill for compensation under the covenant in the lease. He then sued defendant for the false representation: *Held*, ARMOUR, J., dissenting, that the plaintiff could not recover for the loss occasioned by discontinuing to use the land in consequence of the notice of sale; and a nonsuit was directed.

DECLARATION, setting out a lease from defendant to plaintiff, with a covenant from defendant that in the event of a sale of the land by defendant, and upon plaintiff receiving six months notice from defendant that he had sold the land, and on plaintiff receiving compensation for all labour expended thereon up to the date of notice, for which labour plaintiff should not have received any return, that the plaintiff would deliver up the land to defendant, or do so at the end of said six months' notice: that on 11th July, 1877, defendant, "*with intent to induce plaintiff to deliver up to him the said land,*" fraudulently represented that he had sold the land, and fraudulently notified him to deliver up possession to plaintiff at the end of six months from the time of such notice, whereas the plaintiff had not then sold said land; and by such representation defendant induced the plaintiff to discontinue work on the land, as he otherwise would have done, and plaintiff lost the use of the land for a long time, and by reason of the notice was induced to lease another farm, &c.

Pleas: 1. Not guilty. 2. *Non est factum*.

The case was tried at the last Fall Assizes, at Berlin, before Armour, J., and a jury.

The following facts appeared:

The lease, which was dated 1st January, 1873, was for a term of ten years from 1st March, 1873. This was the clause in question :

“It is further hereby agreed by and between the parties hereto, that the lessee, upon receiving six months’ notice from the lessor that he has sold said farm herein mentioned, and that the same has been sold, then, upon the lessee receiving compensation for all labour expended upon said farm up to date of notice, from which the lessee has not received any return, then he, the lessee, will deliver up the said premises to the said lessor at the end of said six months’ notice, the said compensation being so duly paid.”

On 11th July, 1877, plaintiff served notice on defendant that he had sold the farm, and that he required plaintiff to deliver up possession to him after the expiration of six months from leaving of the notice, upon plaintiff’s receiving compensation provided by the lease.

Plaintiff did not deliver up the farm, but continued in possession of the same.

He swore that in consequence of the notice he refrained from sowing fall wheat in the fallow prepared therefor, and also from doing other work. He seemed to have suspected, after some time, and finally believed that defendant had not sold the farm, and so decided to remain and did remain in possession.

Defendant was not examined, but his examination was put in by plaintiff. In this he swore that he had verbally agreed to sell to one McCulloch, who had come from California and was returning thereto, but was to come back to Canada the following January or February, and live on this farm : that there was no writing between them : that McCulloch had since died ; and that he gave the notice in consequence of this.

At the trial counsel for defendant admitted that there had been no sale, and that the only question was, as to damages, and at the close of the plaintiff’s case it was objected, for the defendant, that the plaintiff had never given up the possession, and was not bound to go unless

he received compensation under the lease: that he was asked for his bill of compensation, but never rendered it.

The learned Judge told the jury that the law was, that if one person fraudulently make a false statement, knowing it to be false, to another person, intending the latter to act upon it, and he acts upon it, believing it to be true, and thereby sustains damage, he is entitled to maintain an action against the person so misleading him, and to recover from him for such damages, naturally flowing to him from such misrepresentation, as he can shew he has sustained. The learned Judge commented on the facts proved, warning the jury not to be led away by the repugnance they must feel to the conduct of the defendant, but only to give such damages as they found naturally flowed to the plaintiff from his action in reliance upon and in belief of the truth of the defendant's representation.

The jury found for the plaintiff \$351 damages, leave being reserved to the defendant to move to enter a nonsuit.

In Michaelmas Term last, 20th November, 1879, *Drew*, Q.C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, and on the ground that no cause of action was shewn; or to reduce the verdict to nominal damages, on the ground that, even if a cause of action was shewn, the plaintiff was not entitled to more than nominal damages.

November 28, 1879. *Dunbar* shewed cause. This is really an action of deceit. It is laid down that if a man make a false representation and another act on it to his injury, the former is liable in an action of deceit: see *Evans v. Collins*, 5 Q. B. 804. Now, does the declaration disclose such a cause of action? It does. *Bailey v. Walford*, 9 Q. B. 197. The meaning of the parties was, that if the property was sold it was open to the lessor to terminate the lease by notice. But it was not sold; yet defendant gave notice, and plaintiff left and thus suffered loss. On the point of remoteness of damage, *Mullett v. Mason*, L. R. 1 C. P. 559; *Green v. Button*, 2 C. M. & R., 707.

Richards, Q. C., contra. If the plaintiff had any reason

for believing the fact of the sale to be untrue, the action will not lie. His own examination shews there was no fraud, and that the action will not lie. Then, under the strict terms of the lease, the plaintiff agreed to go out on receiving notice, whether true or untrue; but he chose to discredit its truth, or that of the sale, from the first. He was given notice with the intention that he should go out, and did he act on it? He did not, for he never went out, and, in fact, asserted all along he did not believe there had been a sale: see *Pow v. Davis*, 1 B. & S. 220; *Collins v. Cave*, 6 H. & N. 131.

March 6, 1880. HAGARTY, C. J.—As the declaration is drawn it makes the fact of a sale the ground of the right to give notice.

As I read the covenant, it seems clear to me that when the landlord gave this notice the tenant had the right to act on it as true, and could have insisted on leaving according to its terms, on receiving compensation for his labour, whether the fact stated was true or false. He has this right, or, if he insists that the bargain was that a sale in fact must be made to make the notice good, he could elect to refuse obedience to it or give up possession.

I feel very great difficulty in holding that the tenant has the right to remain in possession despite the notice, and at the same time to claim damages for his acting upon it. Had he acted on the notice and quitted possession the following January, I could understand his claiming] damages for the loss of his term consequent on defendants' alleged falsehood.

A fraudulent representation, made with a view to make a man alter his position to his prejudice, and he so alters it, is actionable.

Here the whole object is, not to induce him to omit putting in a particular crop, but to induce him to surrender his term under the lease at the end of six months. The declaration so states the object, "with intent to induce him to deliver up the land."

As Lord Campbell says in *Gerhard v. Bates*, 2 E. & B. 488, 489: "We consider it clear law that if A. fraudulently makes a representation which is false, and which he knows to be false, meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers a damage, B. may maintain an action on the case for the deceit."

If the plaintiff recover here, it will be for the loss sustained by him in omitting to sow fall wheat, &c. The whole representation made by defendant is: "I have sold the farm, and require you to leave in six months." The whole object is to compel or induce the plaintiff to leave at the time.

Assuming the alleged sale to be non-existent, the defendant, by alleging its existence, seeks and contemplates inducing the plaintiff to give up possession. The plaintiff has never done the act contemplated. I feel great difficulty in meeting this objection.

Giving to the clause in the lease the explanation most favourable to the plaintiff, nothing but an actual sale would warrant the landlord to give the six months' notice. In this view he would not be warranted in giving notice that he had contracted for the sale, or that a sale had been agreed on and was in process of being completed.

If the tenant can say, "Our agreement is, that there must be an actual sale, and then only you can give the six months' notice," it must be that any completed sale must be subject to his right to remain six months after notice thereof.

This construction would put it out of the landlord's power to give a binding notice merely because he had agreed or even signed a contract for the sale, which might never be completed, either from failure to pay or objection to title, &c.

In this view the tenant, after receiving notice, might, with full knowledge of all his landlord's negotiations with the expected purchaser, if they finally broke off, or never were completed within the six months, elect not to

leave, alleging that the sale had never taken place. In such a case could he claim damages for losses sustained by his omitting to sow a crop, &c., believing the sale would be completed? There would be no fraudulent representation, because all parties were cognizant of what was going on, and no concealment or intentional wrong. And yet it would be false in fact to assert that there had been a sale; and there being a duty involved, the defendant might be liable simply because it was his duty to know, and to notify only what was actually true.

In every view of this agreement, I think the tenant could always hold the landlord to his notice, and go at the end of six months.

It is to be observed that the agreement in the lease is, that the tenant is to receive compensation for all labour expended upon the farm up to date of notice, from which he has not received any return.

This, I suppose, must be from the date of reception of notice, and the labour to be paid for must be expended up to that time. He would, on receipt of notice, naturally abstain from expending any labour from which he would not receive a return before the end of the six months.

I see the force of the plaintiff's argument, that as he was only bound to quit on a sale being really made, that as soon as he found a lie had been told, and that no sale had in fact been made, he has the right to refuse to obey the notice and to seek compensation for his damages sustained up to the time he discovered the alleged fraud.

The question is narrowed to this, can he, while refusing to act on or obey the notice, recover for damages consequent on its being given? His true loss would naturally be the loss of his term. That might be of very little value. Can he recover, as it were, intermediate loss, as claimed here, for prospective profits of an intended crop, &c.?

We may regard the whole matter as one of covenant, the landlord covenanting for quiet enjoyment during the term, except in the event of a sale of the farm, and reserving his right then to determine on a six month's notice;

the tenant on his part covenanting to leave in such an event, and on six month's notice thereof. On such covenants I do not see that the tenant could have any remedy unless his possession was determined or disturbed by the land lord notifying him under the lease, the event not having happened.

If the landlord should sue tenant for not leaving at the expiration of the notice, the defence would be that the event of sale had not happened.

This is based upon the plaintiff's construction of the present contract, that the event of sale is a condition precedent to the right to determine by notice. The question in my mind is not free from difficulty.

If a man held *pur autre vie* and the man in remainder came to him and falsely and knowingly represented that the life had dropped by death in a foreign country, with intent to induce him to surrender possession, whereupon the tenant hurriedly sold his stock, &c., at a heavy sacrifice, sustaining large loss, and before he had quitted possession news arrived that the life still existed, it would seem that he ought to recover for his actual injury, though he still held the premises.

In the latter case there was no contract between the parties. The representation was wilfully false, and with intent to injure. Here it is a contravention of the existing contract between the parties, framed for the regulation of their conduct as to the very matter in controversy, and on that account seems distinguishable.

On the whole, not without much hesitation, I think the case fails, and the rule should be absolute to enter nonsuit.

CAMERON, J.—I concur in the opinion of the learned Chief Justice, on the ground that the misrepresentation as to the sale was made to induce the plaintiff to deliver up possession of the demised premises, and that not having been done, the plaintiff, by his own act, has caused to himself the alleged damage arising from not having put in fall

crops. I think, in an action of deceit, the injury must be that contemplated by the wrongdoer, or be the natural result of the misrepresentation. As I read the contract, the giving of the notice *per se* would not put an end to the term unless the land had actually been sold, as to which the plaintiff had a right to be satisfied before he gave up possession, and, according to his evidence, he did not believe that the defendant had sold the place. He said: 'I told defendant I had good reason to believe that he had not sold it. He asserted so strongly that he had sold it, I came to the conclusion I would leave it. * * * He told me I could do as I liked.' That was about getting another place. But the plaintiff did not leave.

I have very great doubt as to whether an action for deceit will lie at all for giving such a notice on such a contract as this, as I think it a matter that should be provided for by the contract itself; but I have arrived at the view that the plaintiff is not entitled to recover on the ground already stated, that the wrong contemplated by the defendant, assuming the case to be as the plaintiff contends, was not effected.

It is no doubt laid down in *Gerhard v. Bates*, 2 E. & B. 489, that if A. fraudulently make a representation which is false, and which he knows to be false, meaning that B. shall act upon it, and B. believing it to be true, does act upon it and thereby suffers a damage, B. may maintain an action on the case for deceit. In the present case, had the defendant succeeded in inducing the plaintiff to deliver up possession, the damage that the plaintiff would have sustained would have been the value of the residue of the term. It was not in the defendant's contemplation that the plaintiff would refrain from cropping the land or part of it with a fall crop, and still not give up possession. Should the plaintiff have refrained from cropping the land unless he intended to give up and did give up possession at the expiration of the six months after notice? If the plaintiff had given up possession, the defendant could not have then said, there was no sale in fact, and you ought not to have

given up possession. The plaintiff would have been justified in acting upon the notice and accepting it as true for the purpose of the action intended, but not for some other action, and he would have been entitled to recover for any loss resulting from acting in accordance with the notice.

In *Mullett v. Mason*, L. R. 1 C. P. 559, Chief Justice Erle says, "It is clear if a seller makes a fraudulent representation to a buyer to induce him to buy, the buyer has the right to act upon it as if it were true, and if he does so the seller must compensate him for *all the* direct consequences that naturally follow from it;" and Willes, J., says, "*was it not necessarily in the contemplation of the parties that it (the diseased cow sold) might be placed with other cows?*" The plaintiff was induced by the misrepresentation of the defendant to treat it in the ordinary way, and the illness and death of the other cows was the direct and natural consequence of so doing." In *Lavysidge v. Levi*, 2 M. & W. 519, Parke, B., uses this language: "As there is fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

What was contemplated in the present case by the defendant was, that the plaintiff would give up possession of the land, and the term would be determined. The putting in crops or not putting them in was a mere question of husbandry, and certainly was not a necessary or natural consequence of the alleged fraud. To fall crop the land might or might not be beneficial, and it was not a matter present to the mind of the defendant, or necessary in his contemplation, that the plaintiff would do so if he did not receive notice, and would refrain from doing so if he did. Of course a prudent man would not put in crops that he could not reap, and his refraining from doing so was not the necessary result of the notice, but of his determination to surrender the term, which he subsequently voluntarily declined to do, and as it appears to me thereby waived the right to any claim he might have had if he had acted on the

notice, according to the intention of the defendant. The injury to the plaintiff would be the same, whether the notice was true or false. The parties by their agreement made provision for the surrender of the term upon a contingency resting very much within the power of the defendant to bring about, though it required the intervention of a third party; and in the event of such contingency arising the plaintiff only stipulated that he should receive compensation for work done on the place in respect of which he received no return up to the receipt of notice. This compensation, I assume, had relation to ploughing or seeding down some field or part of the farm from which he could receive no crop, and would be but a comparatively trifling amount. It does seem then somewhat startling, when this was all that was contemplated and stipulated for, that the defendant, by improperly doing the act that was to bring about this result, should have to pay to the plaintiff an amount equal to the entire rent for a year and a-half of the whole premises. In other words, that because the plaintiff was not permitted, assuming the notice to have been tantamount to a denial of permission, to fall plough the farm and put in fall wheat on thirteen acres, which he alleges was his intention, he was entitled to the use of the farm rent free for a year and a-half. These considerations are as to the quantum of damages, if the plaintiff is entitled to recover, and would be reasons why there should be a new trial for excessive damages; but in the view I take the plaintiff should be nonsuited.

ARMOUR, J.—But for the opinions of the Chief Justice and my brother Cameron, for which I have an unfeigned regard, I should have thought the plaintiff's right to recover the very reasonable damages that have been awarded to him for the gross wrong that was unquestionably done to him by the false and fraudulent conduct of the defendant, to be clear beyond the shadow of a doubt.

As the case presents itself to me, it seems to be a case clearly within the law laid down by me to the jury upon

authority which I have never yet heard or seen questioned, and did I not believe it to be within the law so laid down, I would rather wrestle with the law to bring it within it, than wrestle with the law to find a loophole for the escape of the defendant.

In the first place, I may say that there is no provision in the lease under which the plaintiff could recover for the wrong that has been done him, as for a breach of any contract therein.

The covenant for quiet enjoyment is a covenant against rightful evictions, and not against wrongful ones.

If the plaintiff has any remedy, he has, in my view, chosen the only form of action in which he could obtain such remedy.

I put aside any technical criticism of the wording of the declaration, because I gave the plaintiff full liberty to amend his declaration in any way to fit the facts proved.

I cannot understand why, because the plaintiff did not suffer all the damage he might have suffered from the wrongful act of the defendant, he cannot recover for such damage as he did suffer.

No authority has been cited, nor do I believe any can be found to support so startling a proposition.

The point taken is, that because the plaintiff did not go out of possession he cannot recover any damages at all.

Surely, if the plaintiff, in reliance upon the defendant's representation, had gone out of possession altogether, he could have recovered damages for the injury he sustained in so going out, and if on such reliance he went half out as this plaintiff did, why should he not recover damages for the injury he sustained in going out thus far?

The plaintiff, in this case, in reliance upon the defendant's representation, which he believed to be true, made preparations to leave the demised premises at the appointed time; he rented another farm, which he would not have done but for the representation; he suspended farming operations upon the demised premises before the appointed time; he made up his mind that the representation made

was, as it afterwards turned out to be, untrue, and he determined to continue upon, and did continue upon the demised premises.

He undoubtedly sustained, by the false representation, of the defendant, the damages awarded to him; and I know of no principle in law, there is certainly none in reason and justice, to prevent him from recovering them from the wrongdoer.

Suppose the plaintiff had moved off the demised premises at the appointed time in reliance upon the truth of the defendant's representation, and the defendant had gone into possession of them, and the plaintiff had then found out the falsity of the representation and the fraud that had been practised upon him, and had brought ejectment to recover possession of the premises, as he could have done, and had recovered possession, as he would have done, and had then brought his action, in the form of the present, to recover damages for the injury he had sustained in going out of possession, and being out of possession for the period he was out, would his action have been sustainable? I think it would. Those who maintain that this action is not sustainable, must logically go the length of maintaining that that one would not.

I am willing to take the illustration made use of by the Chief Justice. A, the remainderman goes to B, the tenant of a dwelling house for the life of C, and makes to B the false representation, knowing it to be false, that C is dead, with the intention that B shall act upon it; and B, believing it to be true, so far acts upon it as to rent another house, and to hire an upholsterer to pack up his furniture preparatory to its being moved; but before it is moved he finds out that C is yet alive, and that A's representation is false and fraudulent, and then continues in possession. Has he no remedy against A for the wrong and injury inflicted upon him because he did not go out of possession?

Such a case and the present are undistinguishable in principle.

Such a condition of estates as exists in the supposed

case, I may assume, arises by reason of a contract. The plaintiff's estate in the demised premises arises by reason of interest. The contract in neither case provides against the unforeseen wrong, and not so providing can have no effect to prevent a remedy by an action, such as this, being had for that wrong.

I think the verdict right in law and fact, and that this rule should be discharged.

Rule absolute to enter nonsuit.

MAY V. THE SECURITY LOAN AND SAVINGS' COMPANY.

Goods in bond—Chattel mortgage—Description.

Where the goods forming the subject of a chattel mortgage are in bond, it is not necessary that the mortgage should be registered.

Semble, that the description of goods as "in bond," means in the Customs Warehouse, and is a sufficient description as regards locality.

One of the mortgages was invalid, being to secure the plaintiff as endorser of notes not payable within a year.

THIS was a case stated for the opinion of the Court.

The defendants were judgment creditors in a suit in which Francis Stinson and George May were execution debtors. The sheriff seized certain wines and liquors which were in a bonded warehouse of the Customs' department belonging to the defendant Stinson. The plaintiff, Andrew May, in this interpleader suit, claimed the goods under two chattel mortgages, made by the defendant Stinson to him. The first was a mortgage to secure the plaintiff against the endorsement of four promissory notes made by the mortgagor for \$2,400, payable in six, twelve, fifteen, and eighteen months. The second was, for the payment of \$500, advanced by the plaintiff to said Stinson. An interpleader order was issued to try the right to the goods.

The case came on for trial at the Assizes, held in St. Catharines, in April, 1879, when, by consent, a verdict was entered for the plaintiff, subject to the order and award of the Judge of the County Court, who, upon taking evidence and hearing counsel for the parties, awarded as follows :

That the goods mentioned in the interpleader issue consisted of six cases of brandy, &c., &c.; and that said goods, at the time of said seizure, were in a bonded warehouse of the Customs in St. Catharines, belonging to James Norris, where they had been placed by said Stinson, who had purchased the same subject to duties; and that they were held subject to payment of the same : that said Stinson and said Andrew May were executors of William May, deceased, and that said Andrew May, who was acting executor, had lent and advanced to said Stinson, in 1877, upwards of \$500, belonging to the estate of said William May, no part of which had ever been repaid : that said Francis Stinson had been for many year prior to his executing said chattel mortgages, and was then, carrying on business as a wine merchant in St. Catharines; and that in February, 1878, he was indebted to Hiram Walker & Sons, of Windsor, in the sum of \$2300 ; and that he had obtained from the said Walker & Sons an extension of payment, upon furnishing security : that said Stinson thereupon applied to said Andrew May to endorse his promissory notes for the amount of said debt, and May agreed to endorse such notes upon the promise and agreement of said Stinson to give security upon his household furniture and stock in trade to said May, and also for the payment of \$500 due to the estate of said William May : that said May, on the faith of said promise of said Stinson, endorsed four promissory notes, made by said Francis Stinson, for \$600 each : that said May would not have endorsed said notes but for said promise of said Francis Stinson to give said security : that said Stinson afterwards, on 19th July, 1878, made the said chattel mortgages to said Andrew May, which were duly registered on the 22nd July, following: that the goods and chattels referred

to in the said interpleader issue were part of the goods mentioned and intended to be conveyed by said mortgages, being part of those therein described as the following "goods in bond:" that said mortgages were executed in pursuance of said promise of said Stinson to give the same, and were made in good faith: that said Stinson continued to carry on his said business of a wine merchant after the execution of said mortgages, and paid the first of the said four promissory notes: that said Stinson, from time to time, withdrew portions of said goods in said bonded warehouse, and took them to his said shop and disposed of them in his business, without having any written or other permission of said May: that said May, on 13th December, 1878, *took possession* of such of the said goods mentioned in said mortgages as were in said shop, and also of such of said goods as were then in said bonded customs warehouse, which latter were the goods seized by said sheriff, and referred to in said interpleader issue, claiming to take possession under the terms of said mortgages, on account of the disposal of part of said goods by said Stinson, without the consent of said May; and that said Stinson offered no objection to said May taking such possession, but gave up possession to him: that said goods then in said bonded Customs warehouse were, on said 13th December aforesaid, marked with the letters "A. M.," being the initial letters of the name of said Andrew May, and notice was duly given to the proper official that said May had taken possession thereof; and that, since that date, said May *had had exclusive control of said goods*, subject to the claim of the Customs authorities and had had exclusive possession, so far as possession could be had of goods so situated: that the business of said shop was, after said 13th December, carried on for the benefit of the said May, but by said Stinson and his sons, who were hired by said May for that purpose: that since said date, the second of the said promissory notes had been paid by said May, and that the other two remained unpaid, and, were sued by said Hiram Walker & Sons: that the defendants herein, on 24th December, 1878, recovered the judg-

ment out of which this interpleader issue arose, and the sheriff seized the said wines and liquors in said bonded warehouse under an execution issued on said judgment: that said judgment was recovered upon a covenant contained in a mortgage upon real estate, given by said Stinson and George May to one Calvin Brown, and assigned by him to the defendants, and said mortgage was not in any way connected with the business of said Stinson, but was given to secure part of the purchase money of said real estate: that if *neither of* the said mortgages was valid and good in law, and the possession of said goods taken by May was not sufficient in law, the verdict ought to be for the defendants; but if the mortgages, or either of them, either with or without said possession so taken by said May, as aforesaid, was valid and good in law, the verdict ought to be for the plaintiff; and the arbitrator thereupon awarded that the verdict which had been taken for the plaintiffs should stand, and that the defendants should pay to the plaintiff the plaintiff's costs of the reference and the costs of the award; and if the Court should be of opinion that the verdict ought to be entered for the defendants, then he awarded that the verdict already entered should be set aside and be entered for the defendants, and that the plaintiff should pay to the defendants the defendants' costs of the reference and the costs of the award.

February 9th, 1880. *Bethune*, Q.C., for plaintiff. The plaintiff is entitled to judgment. There was no necessity for a registered bill of sale in a case of this kind. The vendor had not actual possession of the goods. The description of the goods was sufficient.

C. Brown, contra. The mortgage given to secure the endorsements mentioned in the special case was invalid, on the ground that the notes endorsed did not mature within a year, and to secure endorsements the mortgages must shew that the notes fall due within a year, under sec. 6 of the Chattel Mortgage Act, R. S. O. ch. 119. There was not a sufficient description of the goods in the chattel

mortgages. The second mortgage was invalid, on the grounds of insufficient description of the goods, and that it was given for a debt owing to the estate of the late William May, of which the mortgagor and mortgagee were co-executors, and that one executor cannot loan to another. In *Williams* on Executors, 8th ed. pp. 916, 918, several executors are regarded in the light of an individual person, and cannot maintain an action on a contract made by executors jointly with themselves; and at page 960 it is stated that all executors must join in bringing actions. There was not sufficient change of possession to entitle the plaintiff to an absolute ownership of the goods. The following cases were cited: *Mercer v. Peterson*, L. R. 2 Ex. 304; S. C. in App. 3 Ex. 104; *Ontario Bank v. Wilcox*, 43 U. C. R. 484, 485, 486, 488; *Kough v. Price*, 27 C. P. 309; *Turner v. Mills*, 11 C. P. 366; *Rose v. Scott*, 17 U. C. R. 385; *Hiscott v. Murray*, 12 C. P. 315; *Holt v. Carmichael*, 2 App. 629; *Harris v. Commercial Bank*, 16 U. C. R. 437, 445, 446, 450; *Ex parte Keevan*, L. R. 9 Ch. App. 752.

March 6, 1880. HAGARTY, C. J.—It seems to me that in the case submitted to us the plaintiff is entitled to judgment. In the case of sale of goods in a bonded warehouse we do not see how a registered bill of sale is necessary on the facts submitted in this case. They are not in the actual possession of the vendor any more than his goods in the hands of a wharfinger or warehouseman. As far back as *Harris v. Commercial Bank*, 16 U. C. R. 437, it has been so held. The case states two bills of sale executed in good faith on good considerations, both registered. It is stated that the assignee took possession of the goods in the bonded warehouse, the assignor giving up possession to him: that he marked them with his initials and duly notified the proper official that he had taken such possession, and that he has had since then exclusive control of the goods, subject to the claims of the customs authorities for duties, and had full and exclusive possession thereof, so far as possession can be had of goods in a Customs warehouse subject to duties.

We cannot look outside the statements in the case, which says nothing and submits nothing to us as to compliance or non-compliance with any requirements of the Customs Act, 40 Vict. ch. 10, sec. 61, D. referred to on the argument.

The directions there given are apparently only permissive and probably only profess to regulate the transfer in the property of bonded goods as between the Crown and the owner.

Sec. 61 declares that the property shall be transferable on a *bonâ fide* bill of sale by the parties, &c. Sub-sec. 2: "And any such sale shall be valid *for the purposes of this Act*, although the goods remain in the warehouse," provided the transfer be entered in the Collector's book, &c.

Under section 3, on such sale, fresh security may be taken and the old security discharged, and the party being proprietor for the time being shall then be deemed the importer thereof *for the purposes of this Act*.

It is not likely that the Dominion Legislature intended to interfere with the civil rights of parties as between themselves, or to legislate so as to defeat a transfer otherwise good by the law of this Province. The law as to transfer of bonded goods is different from what it was when the Customs Act 10 & 11 Vict. ch. 31, was passed, under which the case of *Harris v. Commercial Bank* was decided, and the facts there were widely different. As the case is presented to us, it is not necessary to decide this point.

If there could be no interest acquired in bonded goods, except on perfecting all the requirements of the Customs Act, the existence of a duly registered and valid chattel mortgage thereon would be inoperative, unless and until such requirements were fulfilled.

The case states: "If the said bills of sale, or either of them, either with or without said possession so taken by said Andrew May as aforesaid, are valid and good in law, the verdict should be for the plaintiff." No objection is urged to the \$500 mortgage, as between the execution

plaintiff and the present plaintiff, except that their description as goods "in bond" is not sufficient. The goods are well described except as to local position. If it were necessary for the decision of this case I think I should hold that such a local description might well be held to mean and imply goods then in the Customs bonded warehouse.

We have not to consider any objections under the insolvent law.

We must answer the questions submitted to us in the plaintiff's favour.

The mortgage for the security of the plaintiff, as endorser, apparently fails on the objection as to the time of credit extending over twelve months, on the doctrine of *Kough v. Price*, 27 C. P. 309, and *Ontario Bank v. Wilcox*, 43 U. C. R. 460. We have already noticed that registration, &c., under the statute, is not necessary on the transfer or sale of goods in bond.

ARMOUR and CAMERON, JJ., concurred.

Judgment for plaintiff.

MASON V. MACDONALD.

Insolvency—Set-off—Lease.

By a lease, made by the defendant to the insolvents, the lessees were "to get pay for improvements at a fair valuation, and to have the right of purchase during the term "by paying the lessor first all claims by way of notes, or otherwise he holds, or may hold, against the said lessees, and the sum of \$235.15 as purchase money," &c. In January, 1875, an attachment under the Insolvent Act of 1869, was issued; and in March defendant filed his claim, which included a note for \$500, most of which sum had been expended in improvements, and had been obtained for that purpose. There had been a valuation of the improvements at the end of the term in 1877, at \$275, in which defendant did not take part, and the assignee sued defendant for that sum on his covenant.

Held, ARMOUR, J., dissenting, that the note formed an equitable if not a legal set-off against the claim: that the right to such set-off was matter of procedure, and governed therefore by the Act of 1875, not the Act of 1869; and that defendant was not precluded by having proved his claim.

Quære, whether under the lease the payment of defendant's claim was not a condition precedent to his paying for improvements.

The difference between our Insolvent Law, as to set-off, and that in England and the United States remarked upon.

Per ARMOUR, J., the question was governed by the Act of 1869, and the plaintiff's claim not being liquidated, defendant's claim could not be the subject of set-off.

THIS was an action brought by the plaintiff, as assignee in insolvency of the firm of Misner & Boyce, on a covenant in a lease between the insolvents (lessees) and the defendant (lessor), by which the defendant agreed to pay for improvements at a fair valuation on the termination of the lease. The lessees went into insolvency during the currency of the lease, in January, 1874. The plaintiff, as assignee of the insolvents, entered into possession of the premises, and continued to occupy them, and pay rent therefor until June, 1877, when the lease expired by effluxion of time.

The insolvents were indebted to the defendant on three promissory notes, on which about \$1,000 remained unpaid. One of these notes included an amount of money and a quantity of material furnished by the defendant to enable Misner & Boyce to put up buildings on the lands.

The defendant, during the currency of the lease, filed his affidavit of claim with the assignee for the full amount of his claim, stating he held no security therefor. No proceedings had ever been taken to get this affidavit of

claim removed, and it still remained on fyle when this action was brought.

The second plea on the record was one of set-off of the defendant's claim on the notes, not alleging plaintiff's claim to have been liquidated before action.

3rd plea. On equitable grounds, setting ont advances by defendant to the insolvents, and that defendant's claim had been liquidated by acts of the parties before action.

Issue.

Replications to 2nd and 3rd pleas, by way of estoppel, setting up the filing of an affidavit in insolvency for the full amount of defendant's claim, and stating that he held no security, &c.

The defendant took issue on plaintiff's replications, and demurred thereto, and plaintiff took exception to the second plea, on the ground that the action being for unliquidated damages, the statutes of set-off did not apply.

On demurrer, the second plea was held bad, as was also the replication of estoppel.

The cause was tried at the last Fall Assizes, at Hamilton, before Hagarty, C. J., without a jury, when the following facts appeared :

By Indenture of lease bearing date the 14th day of September, 1872, and made in pursuance of the Act to facilitate the leasing of lands and tenements, between the defendant, therein called the lessor, of the first part, and William D. Misner and James Boyce, therein called the lessees, of the second part, the lessor demised certain premises therein described to the lessees for the term of five years from the 4th day of June, 1872, at the yearly rental of twenty dollars, which said lease contained the following provisions : " The lessees to get pay for improvements at a fair valuation, and to have the privilege of purchasing at any time during said term the said premises, by paying the said lessor, first, all claims by way of notes, or otherwise, he holds, or may hold against the said lessees and the sum of \$235.15 as purchase money, for the said above described premises ; then and in such case the said

lessor will make a good and sufficient deed of said premises to the said lessees. And the said lessees agree to keep the buildings insured, and will transfer policies to the said lessor, he at the same time binding himself that in case the buildings so insured should be destroyed by fire, he will apply any or all of such insurance moneys to the erection of other buildings on the said above described premises." It also contained a covenant on the lessor's part not to assign or sublet without written leave.

In or about the month of January, 1875, a writ of attachment, under the Insolvent Act of 1869, was issued against the lessees, and on the 17th of February, 1875, the plaintiff was duly appointed by the creditors the assignee of the estate and effects of the lessees. On the 15th of March, 1875, the defendant filed with the assignee his claim, under oath, against the insolvents, and therein deposed that the insolvents were indebted to him in the sum of \$997.99, for the amount of the following account :

1872.

July 1.	To amount of note this day.....	\$453 00	
	" Int. at 8 % to Jan. 8, 1874	91 00	
			\$544 50
Sept. 12.	" Amount of note this day.....	\$100 00	
	" Int. at 8 % to Jan. 8, 1874...	18 66	
			118 66
Dec. 11.	" Amount of note this day.....	\$500 00	
	" Int. at 8 % to Jan. 8, 1874...	83 33	
			583 33
1873.			
Dec. 29.	" Township taxes for 1873.....	\$2 00	
	" Insurance.....	16 00	
			18 00
			<hr/>
			\$1,263 99
24. By	1 buggy.....	\$120 00	
26. "	1 pleasure sleigh.....	45 00	
	" 1 brown mare, 8 years old..	101 00	
			<hr/>
			266 00
			<hr/>
			\$997 99

He further deposed that he did not hold security for the claim, except a certain chattel mortgage, made by the the insolvents to him, bearing date the 28th of December

1872, the validity of which was then in question in the suit of Mason, assignee of the insolvents, against him, deponent, then depending in the Court of Common Pleas.

The plaintiff, as assignee, took possession of the demised premises, and held the same under the said lease for the residue of the term thereby granted.

The lessees had, shortly after the date of the lease, made improvements upon the demised premises, by building thereon a lumber shed and wagon shop, and at the end of the term the plaintiff sent two men to value these improvements, who valued them at \$275. The defendant was not represented at the valuation, nor did he ever give the plaintiff to understand that he was satisfied with it, until he so stated in his evidence at the trial. It was not pretended on the trial that the first two notes mentioned in the pleadings represented any money which had been used in these improvements, but it was contended that the last mentioned note represented lumber and cash which were so used.

The account making up the amount of this note was put in at the trial, and was as follows :

1872.	Sept. 28—To	1,864 feet lumber, at \$14.00...	\$26.10
	" " "	1,646 " " "	... 23.04
	Oct. 4—"	4,050 " " "	... 56.70
	" 12—"	1,952 " " "	... 27.33
	" 14—"	2,054 " " "	... 28.75
	" 16—"	1,130 " " "	... 15.82
	" " "	1,274 " axles,	18.00... 22.73
	" " "	540 " " "	... 9.72
	" 17—"	3,850 " basswood,	15.00... 57.75
	Nov. 13—"	1,224 " pine,	14.00... 17.13
	" " "	28 bundles of lath,	0.35 $\frac{1}{4}$.. 9.87
	" " "	Cash	100.00
	Dec. 4—"	1,030 feet elm,	11.00... 11.33
	" " "	600 " pine.	12.00... 7.20
	" " "	200 " ash and elm	15.00... 3.00
	" 7—"	3,280 " oak,	17.00... 55.76
	" " "	Teaming four loads	12.00
	" 11—"	Cash.....	15.77
			<hr/>
			\$500.00
	Dec. 11—By	note at twelve months	\$500.00

Misner, one of the insolvents, being sworn, said: "These improvements consisted of the shop and lumber shed. I cannot say from whom I got the lumber exactly. We got some lumber from Mr. Macdonald. I remember getting about \$500 in lumber and cash from Mr. Macdonald at the time I built it, and that went into it. The money I got from Macdonald enabled me to put these improvements on. I do not remember how much I got from Macdonald. That is my note that I gave him. Very little of the lumber went into the buildings. The cash went in. The wood for carriage work. I could not say how much of the cash went into the building, most of it did. We built on that. We could not have built without it. The cash and the lumber that we got from him built the buildings. That is my note which you shew me, of December 11th. It was really that money represented by that negotiable note that went into the building. We did not have means to do it. The money we got from Macdonald was to be applied in that way. I did not get all the lumber from Macdonald that went into the building."

The defendant was sworn and said: "I was applied to for advances in lumber or money for the purpose of improvements that were put on these premises. The amount now produced shews the advances made for that purpose. This note of December 11th was given for that advance; that note was for the improvements * * it was given to settle moneys that were to go into the buildings. There was some lumber went into the buildings, and some did not." Ques "There are some axles here, and basswood and elm, there would be no elm or basswood or axles wanted in the building?" Ans. "No." Ques. "Ash or elm?" Ans. "That would not be put in the building." Ques. "Oak?" Ans. "That would be for the carriage works; they got the lumber, part of it was for the building, and part for the works." Ques. "How much of the money you advanced went into the building?" Ans. "I supposed it was all furnished by me. I can swear to some of those items; that pine went into the building, the laths went in. I expect that \$100 there went

into the buildings. I do not pretend to know. * * That note was given in satisfaction of the amount. I know that some of my lumber went into that building; I could swear to it. I think that there was close on \$400 for lumber and money went into that building. I cannot say exactly; the amount is over \$300."

It also appeared that the chattel mortgage referred to in the defendant's claim filed against the estate, was taken for the notes mentioned in the plea. This chattel mortgage was held invalid as against creditors in *Mason v. Macdonald*, 25 C. P. 435, where it is stated at length.

Misner also proved that the value of the improvements, at the expiration of the term, was \$400. The plaintiff, however, stated in his evidence that he was satisfied with the valuation, \$275.

The learned Chief Justice reserved judgment, and subsequently gave a verdict in favour of the plaintiff.

November 24, 1879. *Osler*, Q. C., obtained a rule *nisi* to set aside the verdict and enter it for the defendant, on the law and evidence, in this, that the verdict on the equitable plea should have been entered for the defendant, as the evidence supported that plea; and on the ground that the verdict on the issues on the second and third replications should have been entered *pro formâ*, if at all, for the plaintiff, as these replications had been held bad on demurrer; and on the ground that on the evidence the defendant was entitled to succeed, and nothing was shewn to defeat his right to set-off.

February 10, 1880, *Duff* shewed cause. The defendant, having filed his affidavit for the whole of his claim, is precluded from setting off any part of it against the plaintiff in this action. The right of set-off never accrued to defendant, the claim for which the action was brought not having arisen until after the transfer of the lease to plaintiff, and he having entered and paid rent for it, the defendant could not set off a claim against the insolvents. Even if the actions were between the original parties, the right to set off would not exist, as the action is for unliquidated damages,

and the evidence does not support the allegation in the third plea, that the damages have been ascertained, and have become liquidated by the act of the parties. Under section 124 of the Insolvent Act of 1869, the rights of set-off are those under the statutes of set-off, and equity rights do not assist the defendant. He referred to *Luckie v. Bushby*, 13 C. B. 864.

Osler, Q.C., contra. There is a distinct claim, and the evidence of defendants shews the damages to have been liquidated, in which case the defendant would be entitled to a verdict on the plea. He cited *Watermann* on Set-off, 2nd ed., 451; *Throckmorton v. Crowley*, L. R. 3 Eq. 196; *Makeham v. Crowe*, 15 C. B. N. S. 847.

March 6, 1880. HAGARTY, C. J.—The bankruptcy occurred before the Act of 1875 came into force. The Act of 1869, section 124, declared that “the statutes of set-off shall apply to all claims in insolvency, and also to all suits instituted by an assignee for the recovery of debts due to the insolvent, in the same manner and to the same extent as if the insolvent was plaintiff or defendant,” &c., &c.

The Act of 1875, section 107, declares, “*the law of set-off as administered by the Courts, whether of law or equity*, shall apply to all claims,” &c., &c., as in preceding section.

The Imperial Act of 1869, 32 & 33 Vic. ch. 71, sec. 39, is very different: “When there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving, or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively, &c., &c.”

When the defendant proved his claim, in 1875, the law of that year had not come into force. If the respective claims and liabilities of the parties had then to be determined it would be under the law of 1869, under the statutes of set-off.

If the adjustment of the respective claims and liabilities have now to be determined it will be, I think, under the Act of 1875.

Set-off is generally considered a matter of procedure governed by the *lex fori*. See section 149 of the Act of 1875; *Macfarlane v. Norris*, 2 B. & S. 783.

Sec. 169 of the Act of 1875 declares that the Act of 1869 shall be repealed from the 1st September, 1875, "except so far as regards proceedings commenced and then pending thereunder, and also as regards all contracts, acts, matters, and things made and done before such repeal, to which the said acts or any of the provisions thereof would have applied if not so repealed * * and as to all such contracts, acts, matters, and things, the provisions of said Act shall remain in force and shall be acted upon as if this Act had never been passed: Provided always that, as respects matters of procedure merely, the provisions of this Act shall, upon and after the said 1st September, 1875, supersede those of said Acts, even in cases commenced and then pending, except cases pending before any official assignee in his judicial capacity."

The bankruptcy here had taken place under the Act of 1869, and defendant had proved his debt before September, 1875. But this action did not accrue to any one until 1877, and this action was not brought till 1878.

Now, I do not see that the claim so accruing can fall under the head of a contract, matter, act or thing made or done before the repeal. Every statute is to be considered remedial. It was thought right to enlarge the application of the law of set-off in future to all claims in insolvency, not restricting such applications, as I think, to claims to be thereafter made under an insolvency occurring after the repeal of the existing law, but to all claims advanced after such appeal.

The Interpretation Act, 36 Vic., R. S. O. ch. 1, sec. 42, says, "The repeal of an Act at any time shall not affect any Act done or any right, or right of action existing, accruing, accrued or established, or any proceedings com-

menced in a civil cause before the time when such repeal shall take place, but the proceedings in such case shall be conformable when necessary to the repealing Act."

The plaintiff's right was accruing when the repeal took place. It is in no way lessened or affected thereby. When the first statute of set-off came into effect, is there any doubt but that it could be used against or in answer to a cause of action either accruing or fully accrued at its passing, on which no action was brought till after it came into effect?

Long before any statute of set-off was in existence the Courts of Equity had been in the habit of allowing a set-off, or "stoppage," as it was called, against claims at law or in equity, when equity and good conscience required it.

It is by no means clear that the interference of the Court of Chancery could not have been invoked for this equitable right in proceedings under the Act of 1869.

I do not see why the remedial provisions of the Act of 1875 should not govern this action. The plaintiff's action remains unaffected—the defence to be offered to it is on a more extended principle. "I assume," says Sir A. Cockburn, in *Macfarlane v. Morris*, 2 B. & S. at p. 792, "that set-off is mere matter of procedure, not of substance of the contract between the parties; and consequently must be governed by the *lex fori*. I do not know that it is necessary to decide this point on the present occasion, and certainly something may be said on both sides; but on the whole I incline to that opinion."

See also the American authorities cited in the argument of counsel.

The lease was dated 14th September, 1872. The term was for five years from 4th June, 1872. The covenant is, "the lessees to get pay for improvements at a fair valuation, and to have the privilege of purchasing at any time during said term the said premises, by paying the said lessor, first, all claims by way of notes or otherwise he holds or may hold against the said lessees, and the sum of \$233.15

as purchase money for the said above described premises ; then and in such case the lessor will make a good and sufficient deed of said premises to said lessees. And the lessees agree to keep the buildings insured, and will transfer policies to the lessor, he at the same time binding himself that in case the building so insured shall be destroyed by fire, he will apply any or all of such insurance money to the erection of other buildings on said premises."

Before the execution of the lease the lessor held notes against the lessees, and he continued lending moneys and selling lumber to them. Some of this lumber went into the buildings they erected, and it was sworn that his loans enabled them to make the improvements.

It was not suggested to us in argument that the covenants should be read so that the payment for improvements was conditioned on payment of notes, &c., due to the lessor.

Our chief difficulty in this case arises from the marked difference between our statute and the law that has prevailed for over a century and a-half in England. "Mutual credit," "mutual debts," "mutual dealings," are what has to be regarded in England. Our first Bankrupt Act, 7 Vic., ch. 10, sec. 35, also provided that where there had been mutual credit or mutual debts the account should be stated and one debt set off against the other. Here the direction is simply that the law of set-off, as administered in our Courts of law and equity, shall apply to all claims and to all suits by assignees, in the same manner and to the same extent as if the insolvent was plaintiff or defendant.

Up to 1836 the law as to mutual credit and dealing is fully reviewed in an elaborately argued case of *Young v. Bank of Bengal*, before the Privy Council, 1 Deac. 622.

The law is discussed in *Robson on Bankruptcy*, 264, ed. 1870. It is pointed out, at page 267, that "the right of set-off in bankruptcy does not rest on the same principles as the right of set-off between solvent parties." And section 39 of the Act of 1839 directs that the mutual credit &c., must be between the bankrupt and some person proving, or claiming to prove, when the account has to be taken and set-off, &c., and balance adjusted.

There would be the further difficulty as to the fact that the present claim matured long after the bankruptcy, when it rested on a covenant sounding in unliquidated damages, to be ascertained at a future time.

Then, if the case has to be decided in the words of our own Act, as if the insolvents were the plaintiffs instead of the assignee, two very grave questions arise. 1. What is the effect of defendant having proved his claim against the estate, without reference to the covenant? 2. Does the law of set-off at law or in equity allow a set-off in this action?

As to the effect of the proof. The effect of proof in the United States is stated in *Bump on Bankruptcy*, 9th ed., p. 592; *Brown v. Farmers' Bank*, 6 Bush 198; *Russell v. Owen*, 15 B. R. 322. But the law is governed by the clause in the Act, sec. 20, that no creditor proving his claim shall be allowed to maintain any suit at law or equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against him.

On this the Courts held that there could be no set-off against a suit by the assignee. In the former case, at p. 200, Hardin, J., said: "In our opinion, proving the entire debts, without offering to abate the claims by the amount of said deposit, (for which the assignee sued,) was a waiver of the right so to do, and an election to proceed on said claims alone in bankruptcy, and that the subsequent assertion of part of the same debts by plea of set-off in this action was equivalent to the prosecution of an original suit upon the claims, against the prohibition of the bankrupt law."

Our Acts do not contain any similar provision. Robson, 275: "Under the earlier bankruptcy laws, before there was any statutory provision on the subject, a creditor was not allowed to prove unless he undertook to stay any action commenced by him against the bankrupt; and after proof a creditor was not allowed to sue unless he first had his proof expunged and refunded any dividend received by him."

Under the 49 Geo. III., ch. 121, sec. 14, "The proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed." 6 Geo. IV., ch. 16, also provided for binding the creditor proving.

The Act of 1869, secs. 12 and 13, also had like provisions as to any provable debt restraining the creditor from any remedy against the property or person of the bankrupt except under the Act.

According to Robson, 276, the creditor was not considered to have conclusively elected till his proof was entered. If he sued after the bankruptcy he was allowed to relinquish suit and prove. "According to the old law (says the Vice-Chancellor, in *Ex parte Bernasconi*, 2 Gl. & Jam. 387), as laid down in *Ex parte Wright*, it was competent for a creditor who had proved, upon refunding any dividend which he might have received, to proceed at law."

In *Harley v. Greenow*, 5 B. & Ald. 103, under 49 Geo. III., ch. 121. Bayley, J., said, "that this statute does not make the proof of the debt under the commission an absolute bar to the remedy at law, but only gives to the bankrupt the opportunity of applying for relief either to the Court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt."

In *Bize v. Dickason*, 1 T. R. 285, (in 1786) the plaintiff sued the assignees of a bankrupt to recover back a sum of money which he had paid to them, with a larger sum, by mistake. He owed a considerable sum which he paid, but as to £661, which he also paid, he proved under the commission. A dividend had been paid, and another was declared, but before its payment he notified the assignees of his claim, and brought his action. He had never received any dividend. It was held he could recover. No objection or notice was taken as to his having proved for the amount.

It would seem therefore that, at all events before the 49th Geo. III., and under our statute, the fact of having

proved a claim in bankruptcy was not necessarily a bar to an action at law for the same claim ; subject, of course, to the refunding of any dividend received, and to the possible expunging of the proof.

On the same principle it will be urged here that the proof will be no bar to the right of setting off the claim proved against the assignees, if, as declared by our statute, it is to be treated as if the action were brought by the insolvents.

It remains to consider whether the claim of defendants can be off-set to such a claim as that now urged against.

As a matter between man and man, apart from the insolvent laws, justice would clearly say that we ought if possible to allow the off-set.

I think the plaintiff's claim in the declaration is for unliquidated damages. At law a set-off could not be pleaded generally to a count for unliquidated damages.

The only way in which it could be urged to this declaration would be in some form like this, to meet the facts :

“ And as to \$275, parcel of the damages, &c., the defendant saith, that after accruing of the cause of action in respect thereof, and before the bringing of this action, the plaintiff had the said improvements valued and appraised at the sum of \$275, and duly notified the defendant, who thereupon, and before action, assented to such valuation, as the plaintiff knew, and was willing to pay the same, subject to his claim of set-off hereinafter mentioned, and plaintiff refused to allow such set-off, and this action was commenced only in consequence of such refusal as to such set-off. And defendant as to said sum so agreed on, says that the said insolvents were indebted,” &c., setting out the set-off, and willingness to set off so much, &c., &c.

I incline to think, though not without hesitation, that we may support such a plea. Tindal, C. J., says, in *Morley v. Inglis*, 4 Bing. N. C. 71 : “ The rule by which we are to determine whether or not a demand can become the subject of a set-off is by enquiring whether it sounds in damages, whether the demand is capable of being

liquidated or ascertained with precision at the time of pleading."

In *Crampton v. Walker*, 3 El. & El. 323, it is said, from Welsby's Chitty's Statutes, vol. 3, p. 1026: "There cannot be a set-off against a claim merely sounding in damages, and which is not capable of being liquidated at the time of pleading."

Hill J., refers to *Morley v. Inglis*, 4 Bing. N. C. 58, 70, in support of this rule.

In *Brown v. Tibbets*, 11 C. B. N. S. 855, this is discussed. Of course it is only by a plea framed as suggested that I think it possible to raise a legal set-off. The plea, as it were, liquidates and fixes the demand. If traversed the fate of the set-off would depend upon its being proved or not. I think on the evidence it is substantially proved.

Defendant's solicitor's letter of 20th June, 1877, says that he is prepared to pay for the improvements at a fair valuation under the lease, but claims to deduct the value from his counter claims. Two days after the plaintiff replies demanding \$275, the valuation placed on the improvements by Messrs. Stock and Crooks, but declining to allow this value to be deducted from defendant's claim. Defendant says that he was to have appointed a third man to value, but from not getting in in time he was too late, and the other two valued, and he was always satisfied therewith.

It seems clear that the suit went down for trial solely because the assignee refused to allow defendant's counter claim to be deducted.

Misner, the insolvent, swore that the money he got from defendant enabled him to put up the buildings, and that he could not have put them up without it, and that "the money we got from defendant was to be applied in that way." Some of his lumber was used therefor also.

Defendant swore that the insolvents applied to him for lumber and money for the purposes of improvements. It is true that he took notes from them and a chattel mortgage as security, and it seems clear that he could and

would have recovered these advances had they remained solvent.

The covenant as to paying for improvements is very peculiar. The lessees are to get paid for improvements at a fair valuation, and to have the privilege of purchasing at any time during the term by paying the lessor for all claims by way of notes or otherwise he holds or may hold against the lessees, and the sum of \$233.15 as purchase money for the premises; then the lessor will make a deed, &c. Then the lessees covenant to keep the buildings insured and transfer policies to lessor, he agreeing, in case of fire, to apply the insurance moneys to the erection of other buildings on the premises. At the date of the lease he had advanced to them \$553.

As I have already noticed, it was not contended by defendant's counsel that the payment of defendant's claim was under the lease a condition precedent to his paying for the improvements. Yet the clause seems rather open to such a contention, and the covenant as to insurance and rebuilding might favour the existence of an intention of the parties that the lessor was not to pay unless and until paid his claims.

It is very difficult to lay down any clear rule as to what is equitable set-off.

Such cases as *Rawson v. Samuel*, 1 Cr. & Ph., 161, are always referred to. They do not convey a very clear idea to my mind in the way of definition. *Waterman* on Set-off, 2nd ed., p. 18, *et seq.*, states the equitable doctrine. He states that the insolvency of one of the parties is an element in equitable set-off. "Natural equity" is spoken of, but not very clearly explained. Story's judgment in *Green v. Darling*, 5 Mason, 201, is referred to. He states that "the mere existence of distinct debts is not sufficient to give the right unless there is some mutual credit in relation to such debts arising from the course of dealing." He quotes *Downam v. Matthews*, Prec. Chy. 580, where there were mutual dealings on each side, and independent debts, and the Chancellor held that a set-off ought to be allowed because the

mode of dealing furnished a strong presumption of an agreement to that purpose, and that without such liberty of retaining against each other the parties would not have continued their dealings.

Waterman, pp. 451, 471, quotes the American cases, as shewing that the insolvency of one of the parties was a sufficient ground for the interference of Equity to off-set mere legal demands, although so situated as to be incapable of being off-set at law: *Pond v. Smith*, 4 Conn. 297.

He also cites *Gay v. Gay*, 10 Paige, 369, and then says, at p. 451: "It is deducible from the general scope of the authorities that insolvency has long been recognised as a distinct equitable ground of set-off."

See the note at p. 452, where it is stated that Story, J., doubted whether the English Courts ever admitted a set-off founded upon the mere fact of insolvency. *Waterman* refers to a judgment in *Tuscumbia R. W. Co. v. Rhodes*, 8 Ala. R. 217, reviewing English and American cases, where that Court says that in England insolvency was recognized as a ground for relief.

See also, *Williams v. Davies*, 2 Sim. 461, where this was one of the grounds on which set off was asked.

In *Snell*, on Equity, 4th ed., p. 505, *et seq.*, the subject is discussed: "Courts of Equity are accustomed to grant relief in all cases where there were mutual and independent debts, and there was a mutual credit between the parties, founded at the time, in virtue of their general jurisdiction, upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, was to be understood a knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it. Thus, if A. should be indebted to B. £10,000 in a bond, and B. should borrow of A. £2,000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties to the £2,000 as an ultimate set off, *pro tanto*, against the

debt of £10,000. Now, in such a case, a Court of Law could not set off these independent debts against each other; but a Court of Equity would not hesitate to do so, on the ground either of the presumed intention of the parties, or of what was called a natural equity."

This language is almost identical with section 1435 of Story's Com., vol. 4.

I have not seen any modern English case specially recognizing insolvency as a ground alone.

The American cases seem very clear on this subject, notwithstanding the doubts of so high an authority as Mr. Justice Story.

Jeffs v. Woods, 2 P. Wms. 129, after speaking of its being doubtful whether an insolvent person may, in equity, recover against his debtor to whom he owes a large sum, adds: "However, it seems that the least evidence of an agreement for a stoppage (*i. e.* set-off) will do, and in these cases equity will take hold of a very slight thing to do both parties right."

See also *Curzon v. The African Company*, 1 Vern. 122, notes; *Ex parte Stephens*, 11 Ves. 24; *Ex parte Hansom*, 12 Ves. 346.

On the whole, I incline to think that the set-off may be allowed, if not at law, on the principles of equity.

I decide so with much hesitation. I had formed a wholly different opinion at *Nisi Prius*, and also at and for some time after the argument. The vast difference between our insolvent law and the law that has prevailed in England for the last seventy years, and as it now is in the United States, has surprised me since I have compared them.

I have examined a very great number of authorities in bankruptcy and other reports, but do not wish to burden our reports with a reference to them all.

I decide this case on the express words of our statute, treating it as if the insolvents had been the plaintiffs, as the Act directs.

I think that if the set-off cannot be supported as a legal, it may as an equitable defence on all the facts—the pre-

sumption of mutual trust and credit, the peculiar wording of the contract in the lease, and the fact of the insolvency.

The plain justice of the case is with the defendant, and in the doubtful state in which I find the authorities, I think that ought to turn the scale.

See *Bell v. Curey*, 8 C. B. 887 ; *Gibson v. Bell*, 1 Bing. N. C. 743 ; *Makeham v. Crow*, 15 C. B. N. S. 847. See cases cited in *Bullen & Leake*, 3rd ed., Notes to Equitable Pleas, p. 571.

CAMERON, J., concurred.

ARMOUR, J.—It is difficult to say from the evidence what, if any, part of the account for which the \$500 note was given was used in making the improvements sued for.

It is clear, however, from the taking of that note at a year, with interest at eight per cent., and from afterwards taking the chattel mortgage, which included it, that the defendant did not look to what he might have to pay for the improvements at the end of the term as a fund which would go in reduction of his claim in respect thereof.

The only question appears to me to be, whether the defendant can, under the statutes of set-off, set off his claim upon the notes mentioned in his plea, or any part of it, against the plaintiff's claim in this action.

The provisions in the English Bankrupt Acts as to mutual credits, mutual debts, and mutual dealings, are not to be found in our Insolvent Act of 1869, or in that of 1875.

The only provision as to set-off in the Insolvent Act of 1869 is that contained in the 124th section : "The statutes of set-off shall apply to all claims in insolvency, and also to all suits instituted by an assignee for the recovery of debts due to the insolvent, in the same manner and to the same extent as if the insolvent were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences." And the provision in the Insolvent Act of 1875 is in section 107 : "The law of

set-off, as administered by the Courts, whether of law or equity, shall apply to all claims in insolvency, and also to all suits instituted by an assignee for the recovery of debts due to the insolvent, in the same manner and to the same extent as if the insolvent were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds and fraudulent preferences."

The proceedings against the insolvents, of whom the plaintiff is the assignee, were taken under the Insolvent Act of 1869, and it is by that Act that we must be governed in dealing with the alleged set-off in this case. See Insolvent Act of 1875, sec. 149.

And I am of opinion that under the Statutes of set-off the defendant's claim cannot properly be set off against the plaintiff's. The plaintiff's claim was not a liquidated one, and was the result of the exercise by the plaintiff of the option to get pay for the improvements, which option had never been exercised by the insolvents, and the respective claims of the plaintiff and defendant were not mutual debts.

I think the rule should be discharged.

Rule absolute.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

GEORGE WHITFIELD GROTE, WILLIAM COSBY MAHAFFY, P. A. MACDONALD, WILLIAM LAWRENCE, WILLIAM LEIGH WALSH, JOHN J. W. STONE, COLIN SCOTT RANKIN, HORACE COMFORT, ALEXANDER V. MCCLENEGHAN, MARTIN SCOTT FRASER, WILLIAM PATTISON, WILLIAM REUBEN HICKEY, GEORGE MONK GREEN, JAMES THOMAS PARKES, MICHAEL J. GORMAN, HARRY EDMUND MORPHY, CHARLES AUGUSTUS KINGSTON, JOHN HENRY LONG, JAMES C. DALRYMPLE, JOHN JACOBS.

SITTINGS IN VACATION

AFTER HILARY TERM.

IN RE THE CORPORATION OF THE TOWNSHIP OF ALBEMARLE
AND THE CORPORATION OF THE UNITED TOWNSHIPS
OF EASTNOR, LINDSAY, AND ST. EDMUNDS.

Separation of townships—Arbitration—Municipal loan fund.

Held, that the arbitrators on the separation of united townships, under R. S. O. ch. 174, sec. 28, should not take into consideration moneys received by the union, under 36 Vic. ch. 47, O., from the Government on account of the Municipal Loan Fund, and appropriated by the union to the purposes authorized by that Act; but that they might apportion any part of it remaining unappropriated, and in doing so need not be governed by the population of the several townships according to the census of 1871, as provided for the distribution by the Government under that Act.

The duty of such arbitrators is to ascertain the assets of the union, real and personal; dispose of the personal property as may be just; make proper allowance for the real estate to the township deprived of it by the separation, and for the personal property assigned to either municipality in excess of its share; and ascertain and apportion the liabilities. They should consider the value of the real property of the union in each township as an asset, and what allowance, if any, should be made by the township retaining it under the statute to the separating township.

On the 6th of June, 1879, *Aylesworth* obtained a rule *nisi* from Osler, J., sitting alone, on behalf of the corporation of the township of Albemarle, to set aside an award made on the 15th day of April, 1879, by Robert Graham and Thomas S. Campbell, two of the three arbitrators to whom a reference had been made, under the provisions of the Municipal Institutions Act, ch. 174, sec. 28, R. S. O., upon the dissolution of the union existing between the township of Albemarle and the townships of Eastnor, Lindsay, and St. Edmunds, on the grounds that the arbi-

trators had improperly allowed the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds, a portion of the sum of \$1,690 of Municipal Loan Fund money granted in the year 1874 to the corporation of the united townships of Albemarle, Eastnor, Lindsay, and St. Edmunds, although that money had been expended in the said townships before their separation; and on the ground that such apportionment, if it should have been made at all, was improperly made upon the basis of the assessment of the said townships respectively for the year 1874, when it ought to have been on the basis of the census of the year 1871; and also on the ground that the arbitrators improperly took into consideration the current expenditure of the said townships during their union up to their separation, and had not allowed to the township of Albemarle such sum as was just in respect of the real and personal property of the union.

The award provided, first, that the township of Albemarle should pay to the county treasurer of the county of Bruce the sum of \$2,779.35, being the amount of debt due to the said county of Bruce by the united townships of Albemarle, Eastnor, Lindsay, and St. Edmunds, on the 1st of January, 1878; that the township of Albemarle should pay to the townships of Eastnor, Lindsay, and St. Edmunds, the sum of \$82.02, on or before the first day of January, 1880. There were further provisions respecting costs, in effect, making the township of Albemarle and the united townships of Eastnor, Lindsay, and St. Edmunds, bear the costs of the reference equally; and by the fifth clause of the award it was provided that the township of Albemarle should pay all costs incurred in the Court of Queen's Bench on account of an application on the part of the townships of Eastnor, Lindsay, and St. Edmunds, to refer back to the arbitrators a former award, which application was successful. By the former award the townships of Eastnor, Lindsay, and St. Edmunds, were ordered to pay to the township of Albemarle the sum of \$882, but in making their award the arbitrators failed to take into account and consider the

amount due to the former union in respect of unpaid taxes, said to amount to about \$300.

The last award appeared, from the affidavits and papers filed, to have been arrived at in the following manner: The arbitrators found the liability of the united townships to the county of Bruce, and there seemed to be no other indebtedness, to be \$2,779.35. Of this sum they charged against Albemarle \$1,717.35, and against Eastnor, Lindsay, and St. Edmunds, \$1,062. Then against this last sum they credited to the last named townships the sum of \$788.72, as their portion of the Municipal Loan Fund grant in 1874. They also credited to these townships the sum of \$355.30, taxes collected by Albemarle after the separation, and due in respect of land in Eastnor, Lindsay, and St. Edmunds, making the account stand thus:

Portion of debt payable by Eastnor, Lindsay, and St. Edmunds, to county of Bruce.....	\$1,062.00	
Due to them by Albemarle on account of Municipal Loan Fund grant, 1874..	\$788.72	
Taxes received after separation.....	355.30	1,144.02
Balance due by Albemarle.....	\$	82.02

February 20th, 1880. *H. J. Scott* shewed cause. The provision by sub-sec. 4, sec. 27, of the Municipal Act, that the one township shall pay or allow to the other such sum as may be just, contemplates an equitable settlement between them, and the course taken by the arbitrators in considering all the amounts received during the union and taking into consideration the amounts contributed by and expended upon each of the municipalities was correct. They were entitled to look upon the municipal loan fund moneys as a joint asset and distribute it as if it had been raised by taxation.

Bethune, Q.C., supported the rule. The intention of the statute is, that nothing should be considered except the actual debts and property of the union, and all past transactions must be looked upon as at an end. Even if the arbitrators can take into consideration past transactions,

they must distribute the municipal loan fund moneys according to the population of the townships in 1871, under 36 Vic. c. 47, sec. 2, O.

March 23rd, 1880. CAMERON, J.—By sec. 27, ch. 174 R. S. O., it is declared: "After the dissolution of a union of townships, the following shall be the disposition of the property of the union:

1. "The real property of the union in the junior township shall become the property of the junior township."

2. "The real property of the union situate in the remaining township or townships of the union shall be the property of the remaining township or townships."

3. "The two corporations shall be jointly interested in the other assets of the union, and the same shall be retained by the one, or shall be divided between both, or shall be otherwise disposed of, as they may agree."

4. "The one shall pay or allow to the other in respect of the said disposition of the real and personal property of the union, and in respect to the debts of the union, such sum or sums of money as may be just."

5. "In case the councils of the townships do not, within three months after the first meeting of the council of the junior township, agree as to the disposition of the personal property of the union, or as to the sum to be paid by the one to the other, or as to the time of payment thereof, the matters in dispute shall be settled by arbitration under this Act."

It does not appear from the evidence, or the finding of the arbitrators, in terms what real or personal property the union possessed, but it may be conjectured therefrom that the only real property was a piece of land used as a cemetery, situated in the township of Albemarle, and valued at about \$200; and the only personal property was a couple of scrapers; and it does not appear what was, or is, the nature of the debt due to the county of Bruce, or for what purpose contracted.

I am not in a position to say whether the award,

on the merits, is just or otherwise, except in so far as it is affected by the grounds of objection in respect to the allowance to the townships of Eastnor, Lindsay, and St. Edmunds, on account of the amount received by the old municipality from the Government on account of the Municipal Loan Fund. By the Act 36 Vic., ch. 47, O., the County of Bruce became entitled to the sum of \$116,379.40, which, by section 2, was to be distributed by the Lieutenant-Governor in Council among the local municipalities therein, according to the population of such local municipalities by the census of the year 1871; and if the population of a municipality did not appear by the census, then it might be ascertained in any other way satisfactory to the Lieutenant-Governor. By section 11, all moneys paid to a municipality under the Act were to be kept separate from all other moneys, and by section 12 were to be applied in some of the following ways: "In aid of railways, drainage, building or improvement of court house or gaol, building or improvement of an hospital, providing for the use of the municipality an industrial farm, a public park, a house of industry or refuge; or in building or improving schools, public halls, bridges, harbours, piers, or gravel roads; or in making other permanent improvements affecting the municipalities; or in or towards the reduction or payment of municipal obligations already contracted for permanent works." By section 13 the municipal council of the municipality was, at any time after the 1st of February, 1874, authorized to pass a by-law appropriating the money to any of the authorized purposes. By the Act 38 Vic., ch. 29, O., the purposes to which the money might be applied were extended, and they were again further extended by 39 Vic. ch. 4, O., and by this last Act all by-laws already passed, making such appropriation as the Act authorizes, were confirmed.

It would seem clear from these provisions that if an appropriation of the moneys received by the old union of townships had been made it could not now be disturbed or considered by the arbitrators in determining the respective

rights of the several municipalities composing the union. The moneys so appropriated and expended would not now be either an asset or liability of the Union. I think, therefore, the arbitrators did wrong in making any allowance to the united townships of Eastnor, Lindsay, and St. Edmunds, in respect of the moneys received by the union on account of the Municipal Loan Fund Debts Act.

The award must, therefore, be remitted back to the arbitrators in order that they may amend, and make their finding without considering the moneys received on account of the Loan Fund Act. If the money remains in the hands of the treasurer unappropriated, then I think the arbitrators may direct that a portion of it should be transferred to the treasurer of the united townships of Eastnor, Lindsay, and St. Edmunds, to be appropriated by that Municipality in accordance with the provisions of the Act 36 Vic., ch. 47, and the amending Acts; and in that event I do not think the arbitrators must be governed by the population of the several townships comprising the union in 1871, but would be justified in taking the assessment rolls of the year in which the money was received as one of the guides to arrive at a just proportion to be assigned to the united townships of Eastnor, Lindsay, and St. Edmunds. The census of 1871 was the basis of distribution under the Act of the money granted by the Government, but it was to be made to the municipalities as they existed on the 1st of February, 1874, and their rights began then and were not affected by the condition of things in 1871, except in so far as the amount to be received by the municipality was concerned.

Though the real property in each of the united townships is to be the property of the township in which it is situated, the arbitrators should, I think, consider its value as an asset, in determining the rights of the different municipalities with respect to each other on a dissolution of the union. Full effect cannot be given to sub-section 4 of sec. 27 of ch. 174, R. S. O., unless the arbitrators are to take into consideration the value of

the real property. This sub-section provides the one member of the union shall pay or allow to the other in respect of the *said disposition* of the real and personal property of the union, and in respect to the debts of the union, such sum or sums of money as may be just. The only disposition of the real property referred to is that which the section itself makes, namely, the vesting it in the township in which it is situate.

There may be very good reason why a municipality should not own or control real property situate outside of the bounds of the municipality, and therefore it would be more expedient that any such real property should, by operation of the law, be vested in the municipality where situate; but it would, or might be, exceedingly inequitable that a valuable land property owned by a union of townships, and acquired by their joint means, should, on a dissolution of the union, belong exclusively to the township in which it was situated, without equivalent or compensation to the other; and the above sub-section 4 provides against such an injustice. The circumstances connected with the acquisition of the real property, its use and purposes, are matters to be considered by the arbitrators in determining what, if any, allowance should be made by the township retaining it to the separating municipality.

In an arbitration like the present, the duty of the arbitrators is to ascertain the assets of the union, both real and personal; to make such disposition of the personal property as may seem just; to make such allowance in respect of the real estate to the township or municipality deprived of the land itself by the terms of the Act, and of the personal property assigned to one of the municipalities in excess of its share, as may seem reasonable. They should then ascertain the liabilities of the union and apportion them as justice may, under the circumstances of each case, require.

The counsel for the respective municipalities suggested that, under the power given to the Court by the Municipal

Institutions Act, if I determined the award made was improper, for the reasons assigned, that I should make an order defining the obligations of the respective municipalities, and I would willingly do so if the material before me enabled me to arrive at a conclusion; but neither the precise value of the real estate, nor the nature and purpose of the indebtedness to the county of Bruce, sufficiently appears. The respective municipalities, however, should only desire that what is just to both should be done, and with this desire existing there does not appear any substantial reason why they should not be able to agree upon a satisfactory settlement without incurring any further expense, which already has grown much beyond what the interests involved would seem to demand.

If right in the view I have taken, the method adopted the arbitrators in arriving at the proportion of the debt to be borne by each municipality not being inequitable, the account would stand thus :

Portion of the debt payable by the united town-	
ships of Eastnor, Lindsay, and St. Edmunds.....	\$1,062.00
Less amount received for taxes after dissolution...	355.30

Balance payable to Albemarle	\$ 706.70
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Less Eastnor, Lindsay, and St. Edmund's portion of the value of the real property.

The inequity of allowing the present award to stand is made apparent by the consideration, if the union had continued, the townships of Eastnor, Lindsay, and St. Edmunds, would have had to provide for the payment of the debt to the county of Bruce, in common with the township of Albemarle, and the only asset that they would have had an interest in, beyond the annual rates required to meet current expenditure, would be the real property, or cemetery lot.

If the parties cannot agree upon a settlement, the award must be referred back to the arbitrators, who must make their amended award within six weeks.

The provision of the award making the corporation of

Albemarle liable for the costs incurred in the former application to set aside the award, or to refer it back, was in excess of the power of the arbitrators; but it was not taken by the rule, although raised upon the argument, and if that were the only objection entitled to prevail, it would only affect that clause of the award. The first award was not very far from right, and it would have been to the interest of both municipalities had it not been disturbed.

The ends of justice will be best served by making the rule absolute, without costs.

Rule absolute, without costs.

IN RE HORTON AND ADMASTON AND CANADA CENTRAL
RAILWAY CO.

Railway—Arbitration and Award—Jurisdiction—Nullity.

The Court has no jurisdiction to set aside an award made under the Railway Act of 1868 (31 Vict. ch. 28, D.); but, *Held*, that even were there jurisdiction the Court would not have interfered in this case, as the instrument in question was in no sense an award under the statute, the provisions of the statute not having been observed, there having been only two arbitrators appointed, who had not been sworn, and subsec. 26 of sec. 9 not having been complied with.

February 7, 1880. *C. Robinson*, Q.C., obtained a rule *nisi* calling upon the Canada Central R. W. Co. to shew cause why the award in this matter should not be set aside, on the ground, among others, that the two arbitrators by whom the award purported to be signed had never appointed a third arbitrator, nor taken any oath of office, as required by the statute.

The following was the instrument purporting to be the award:—

“The agreement, made at the village of Renfrew, this eighth day of November, 1879, between David Airth, Esq., arbitrator on behalf of the townships of Admaston and

Horton, and James Allan, P. L. S., arbitrator on behalf of the C. C. R. Company, sheweth that we, the above-named arbitrators, have mutually agreed that the said railway company shall pay to the said corporations of Admaston and Horton the sum of one hundred dollars, as soon as the said corporations give to the said company a proper and satisfactory guarantee that no further demands whatever shall ever be made on the said company with regard to that part of the town line lying between the said townships which the said railway now occupies or obstructs.

"That unless the said corporations give such guarantee to the said company, the said company shall not pay anything for obstructing or occupying the said town line.

"And that said corporations shall pay their own costs, and said company shall likewise pay its costs.

"DAVID AIRTH,
"JAMES ALLAN."

March 23, 1880. *Richards*, Q.C., shewed cause. The proceedings were under the *Railway Act of 1868*, which contains no provision similar to subsecs. 19 and 20 of sec. 20 of c. 165 of the Revised Statutes of Ontario; nor does the reference come under sec. 201 of the Common Law Procedure Act; so the Court has no summary jurisdiction over the award, and no authority to set it aside. Subsec. 17 of sec. 9 provides that the arbitrators, or any two of them, shall ascertain the compensation to be paid. It was, therefore, not necessary that they should appoint a third arbitrator unless they disagreed. The provision in the statute as to the arbitrators being sworn is merely directory. The 26th subsec. of sec. 9 cures want of form and technical objections, and there has been a substantial compliance with that subsection.

C. Robinson, Q.C., contra. The Court has jurisdiction to set aside this award. In *The Credit Valley R. W. Co. and The Great Western R. W. Co.*, in Appeal, not yet reported, it was held that a reference under the Railway Act, R. S. O. ch. 165, sec. 9, subsec. 15, as to the crossing of one railway by another, was not a submission by consent under sec. 201 of the C. L. P. Act, and could not be made a rule of Court. There, however, the arbitrators

are appointed by a Judge, not by the parties. In *Rhodes v. Airedale Drainage Commissioners*, L. R. 1 C. P. D. 402, a submission under the Lands Clauses Consolidation Act was held to be a submission by consent: *Russell on Awards*, 5th ed., 98. It is true that statute says the appointment of an arbitrator shall be deemed a submission to arbitration; but here each party appointed an arbitrator, and it is in fact an arbitration by consent. The award is clearly bad, so defective that it may perhaps be regarded as a nullity. Among other objections, no third arbitrator was appointed, the arbitrators were not sworn, and the award does not describe the property for which compensation is given.

March 30, 1880. GALT, J.—This was an application to set aside an instrument purporting to be an award between the above-named townships and the defendants.

If there had actually been an award, I agree with Mr. Richards in thinking the Court had no jurisdiction to set it aside; but the instrument in question is in no sense an award under the statute. As was contended by Mr. Robinson, the provisions of the Railway Act have not, in any one respect, been complied with. There were only two arbitrators; they were not sworn; and what is called the award does not comply with the 26th subsec. of sec. 9. That enacts, "No award shall be invalidated from any want of form or other technical objection, if the requirements of this Act have been complied with" (this has not been done), "and if the award state clearly the sum awarded and the lands or other property, right or thing, for which such sum is to be the compensation." This also has not been done. When the Legislature enacted that an award should not be invalidated for certain irregularities or want of form, and at the same time made no provision for setting it aside, it appears to me the intention was that if the instrument was invalid it should be considered as a nullity; that is to say, would afford no defence to the company for any act done under it.

As I am of opinion that I have no power to set aside what is claimed to be an award under the statute, this rule will be discharged; but, as the company contend it is an award binding on the parties, and I am satisfied it is not, there will be no costs.

Rule discharged, without costs.

REGINA V. TEFFT.

Medical Act of Ontario—R. S. O. c. 142. sec. 42—Conviction—Distinction between “M.D.” and “M.C.P. & S.” as implying registration.

Where the defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fan-light containing the names of the registered practitioners, with the additions “M.D., M.C.P. & S., Ont.,” and the name of the defendant with only the addition “M.D.”

Held, that the use of the simple letters “M.D.,” in contradistinction to the full titles of the partners of defendant appearing on the same fan-light, was not the use of a title “calculated to lead people to infer” registration, and that defendant therefore could not be convicted under sec. 42 of the Ontario Medical Act, R. S. O., ch. 142.

March 23, 1880. *Shepley* obtained a rule *nisi* to quash a conviction made under the Ontario Act Respecting the Profession of Medicine and Surgery (R. S. O. c. 142).

The information charged that the defendant, on February 19th, 1880, not being registered to practice medicine in the Province of Ontario, did use a title implying and calculated to lead people to infer that she was registered under the aforesaid Act, contrary to the statute in that behalf made and provided.

The evidence of the complainant was: “I know the defendant’s place of residence, on the south-west corner of Gerrard and Jarvis streets, in this city. On the fan-light was painted E. Amelia Tefft, M.D. I have seen her advertisement in the Mail newspaper. I produce the advertisement.” The advertisement was not, however, produced.

Another witness stated: "I know the defendant. She lives at the south-west corner of Jarvis and Gerrard streets. E. Amelia Tefft, M.D., is on the fan-light over the door, under the names Mrs. Jenny K. Trout, M.D., M.C.P.S., and James Allen, M.D., M.C.P.S. I don't know who put the names over the door. The advertisement in the directory was put in by me for Mrs. Trout, I think."

Mrs. Trout stated: "I have the lease of the house on Jarvis street, corner of Gerrard. I ordered the lettering on the fan-light without consultation with Miss Tefft, and I put the advertisement in *The Mail* in the same way. Miss Tefft prescribes under my supervision. She is interested in the general profits of the institution. She sometimes prescribes."

The foregoing was all the evidence.

The Police Magistrate convicted the defendant, "For that she, not being registered to practise medicine in the Province of Ontario, pursuant to the above mentioned Act, did unlawfully use a title implying and calculated to lead people to infer that she, the said Emily A. Tefft, is registered under the aforesaid Act, contrary to the statute in such case made and provided. And I adjudge the said Emily A. Tefft, for the said offence, to pay the sum of \$25; and in default of sufficient distress, I adjudge the said Emily A. Tefft to be imprisoned, and there kept at hard labour for twenty days."

The following, among others, were the grounds taken in the rule:

1. That the evidence, upon which such conviction was made, did not establish the offence against the Act charged in the information, and of which defendant was convicted, or any offence.

2. That, assuming that the evidence shewed the offence charged to have been committed, there was no evidence to convict defendant of such offence.

3. That the evidence did not warrant the said conviction.

April 9, 1880. *Watt* shewed cause.

Shepley, contra. There is clearly power in the Court to review the finding of the Police Magistrate, because there

is no dispute as to the facts, and the Magistrate made no finding on any contradictory evidence; and where the evidence is so slight as not to warrant the conviction, or where there is not sufficient evidence to go to a jury, the Court can and will go behind any finding of the Magistrate: *Paley*, on Convictions, 135 to 139; *Rex v. Hall*, Cowp. 728; *Ex parte Ransley*, 3 D. & R. 572. Here there is no evidence whatever to connect defendant with the offence. The advertisements in *The Mail* and *The Directory* were not proved, and, if they had been, the defendant is shewn not to be responsible for them. The statute inflicts a penalty, and strict proof must be given to make defendant subject to the penalty. The evidence as to the fan-light fails to connect defendant with the lettering upon it, even supposing that lettering to embody an infringement of the section. The fact of defendant being a partner in the institution, and being interested in the profits, does not aid the prosecution: *Turner & Smith v. Reynall*, 9 Jur. N. S. 1077; *Swan & Walker v. Scott*, 23 U. C. R. 434. The use of the letters "M.D." after defendant's name on the fan-light, however, is not an infringement of this section. Coming, as it does, after the names of the other partners, with their full additions, it could not mislead the public. It does not imply registration. Sec. 3 provides a designation implying registration, viz.: "M.C.P.S.," and the letters "M.D." are a mere academic distinction. Sec. 41 provides a penalty if these latter letters are falsely used, and sec. 42 does not apply to the use of these letters at all, but to the use of the letters implying registration under sec. 3, or of other titles denoting registration: *Ellis v. Kelly*, 6 H. & N. 222. The clause in the conviction ordering imprisonment at *hard labour* is *ultra vires*. Sec. 47 only provides for procedure in accordance with R. S. O. c. 74, and that Act does not deal with the enforcement of penalties. The conviction should be quashed, and costs given against the prosecutor: *Regina v. Edmonds*, 31 L. T. N. S. 237; *Skerving v. Honeyman*, 16 C. L. J. 117.

April 13, 1880. GALT, J.—The information and conviction are under the 42nd sec. of the Ontario Medical Act, which enacts: "Any person not registered pursuant to this Act who takes or uses any name, title, addition, or description implying, or calculated to lead people to infer, that he is registered under this Act, or that he is recognized by law as a physician, surgeon, accoucheur, or a licentiate in medicine, surgery, or midwifery, shall be liable, upon a summary conviction thereof before any Justice of the Peace, to pay any penalty not exceeding one hundred dollars, nor less than twenty-five dollars." The words of this section are very general as to medical practitioners, or as respects persons representing themselves to be recognized by law as a physician, &c.; but it is evidently intended, as appears to have been the view of the learned Police Magistrate, to be restricted to persons unlawfully representing themselves to be registered under the Act; for, by the 41st sec., it is enacted that "Any person who wilfully or falsely pretends to be a physician, doctor of medicine, surgeon, or general practitioner, or assumes any title, addition, or description other than he actually possesses and is legally entitled to, shall be liable, on conviction thereof before a Justice of the Peace, to a penalty not exceeding fifty dollars, nor less than ten dollars." The distinction between the two clauses is plain. If a person is really and truly a doctor of medicine, &c., he is not punishable under the 41st sec., although he may not be registered; but if he professes to be registered, he is punishable under the 42nd. The defendant is not charged under the 41st sec., where she might or might not be liable, according to whether she had or had not a diploma, but under the 42nd; and it appears to me there was no evidence to support this conviction; on the contrary, I think the evidence draws a marked distinction between her and her friend Mrs. Trout. Both names are painted on the same fan-light. Mrs. Trout is described as "Mrs. Jenny K. Trout, M.D., M.C.P.S.," then there is "James Allen, M.D., M.C.P.S.," and beneath these the defendant's name, "E. Amelia Tefft, M.D." I do not think that

any person looking at the names painted on the fan-light could avoid seeing the difference between the position of Mrs. Trout, Dr. Allen, and the defendant; but, at any rate, it is plain that if they made a mistake it was through no false representation of the defendant.

A consideration of the 43rd sec. shews that the Legislature intended the 42nd sec. to apply exclusively to cases of a false representation of registration, because the 43rd sec. has no application to members of the society, but refers to parties practising as medical men or surgeons; such, for example, as persons duly qualified as doctors or surgeons, and who would not be liable under the 41st sec., and disables them from recovering any charge unless they are registered.

The conviction must be quashed.

Rule absolute.

IN RE BIRDSALL AND FARRAR AND THE CORPORATION OF
THE TOWNSHIP OF ASPHODEL.

*Municipal corporations—By-law to close road—Insufficiency of notice—
Application to quash.*

Held, that the notice of intention to pass a by-law to close a road should state the day on which the municipal council intend considering the by-law.

Semble, that the mere fact of the relator having knowledge *aliunde* was not a sufficient answer to an application by him to quash for want of a proper notice of the day on which the by-law was to be so considered.

November 28, 1879. *E. B. Edwards* obtained a rule *nisi* from Armour, J., sitting alone, on behalf of Francis Birdsall and Charles Farrar, calling on the Corporation of the Township of Asphodel to shew cause why a by-law closing a road running through lots 3 and 4 in the first concession of that township, should not be quashed, on the grounds, amongst others, 1: That the required notice of intention to pass such by-law and of the time of passing was not given and published. 2. That in consequence the relators had no opportunity of being present or being heard when the by-law was introduced and passed, and were not heard.

It appeared that the road in question was not an original allowance, but had been established and in use for forty or fifty years.

A copy of the proceedings of the council was put in. Attempts had been made, it seemed, for two or three years to persuade the council to stop this road, and on May 31, 1879, it was resolved to adjourn the closing of the old road crossing these lots until the last Saturday in September.

On 27th September, 1879, the by-law was read a first, second, and third time, and passed.

The clerk, one Powell, proved that a notice in these words,

“ROAD NOTICE :

“The Municipal Council of the Township of Asphodel intend to pass by-laws for stopping up the old road run-

ning through lots 3 and 4 in the 1st concession, and the old road running through the west end of lot 10 in the 4th concession of said township.

"August 11, 1879,

"JOHN POWELL,
"Township Clerk,"

was published for four successive weeks in a weekly Peterborough paper, upon the 15th, 22nd, 29th August, and on the 5th September last.

Another notice was in these words :

"ROAD NOTICE :

"At a meeting of the Municipal Council of the Township of Asphodel, to be held in No. 1 School House, Westwood, the Council intend passing by-laws closing the old road through lots 3 and 4 in 1st concession, and the old road crossing the west end of lot 10 in the 4th concession of Asphodel.

"JOHN POWELL,
"Township Clerk.

"Westwood, August 8, 1879."

This last was inserted in a newspaper published weekly at Norwood, in an adjoining municipality, on the 14th, 21st, 28th August, and 4th and 11th days of September.

It was proved that on 16th August copies of the last notice were posted in six public places. No newspaper was published in Asphodel.

May 24, 1880. *Marsh* shewed cause. So far as Bird-sall is concerned it is a sufficient answer to the objection of want of notice by publication pursuant to the statute that Birdsall had actual notice of the intention of the council to pass the by-law, and of the time and place of their meeting for that purpose, Birdsall having attended the meeting of the council in April, at which time a regular adjournment was made until the day of the meeting on which the by-law was passed, and he having otherwise been informed of the intention of the council: *Parker v. The Municipalities of Pittsburgh, &c.*, 8 C. P. 517. The provision in the statute as to notice was meant only for the protection of

the parties interested, and where, as in this case, the applicant has not been damnified by the want of publication, he cannot rely upon that objection. He cannot set up the *jus tertii* and say that the statute requires the publication for the information of the general public as well as himself. The objection can only lie in the mouth of one who is otherwise entitled to move, and does move, against the by-law, and who had not actual notice. If it were held otherwise then a by-law might be quashed on the application of a party having actual notice, who relied upon the rights of third parties, while had the third parties appeared before the Court it might have been shewn that they also had actual notice. The applicants rely upon *Coe and The Corporation of Pickering*, 24 U. C. R. 439, decided under the Temperance Act. There the provision of the statute as to notice was for the protection of the general public, and not merely for the protection of those immediately interested, as is the case here. The only real estate that Farrar owned in the township is a small piece of land conveyed to him by Birdsall for the express purpose of preventing the closing of the road in question, and the Court has already held in this case that Farrar could not by reason of that conveyance be heard to say that he was being shut out from ingress and egress to and from the said land over the road in question. No more can he by reason of that conveyance be heard to set up the want of notice, and without being the owner of some land in the township he cannot be damaged by the want of notice of the passing of the by-law, and has no status as a relator.

Bethune, Q. C., contra. Sec. 506 makes it necessary to give notice and this objection may be taken, although the applicant had express notice, that is to say, they can rely on the *jus tertii*.

May 11th, 1880. HAGARTY, C. J.—The Municipal Act, R.S.O., ch. 174, sec. 506, provides: "No council shall pass a by-law for stopping up * * any original allowance for road, or for stopping up * * any other public highway * *

"1. Until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places. * *

"2. And published weekly for at least four successive weeks in some newspaper. * *

"3. Nor till the council has heard, in person, or by counsel or attorney, any person whose land may be prejudicially affected thereby, and who petitions to be so heard.

"4. And the clerk shall give such notices." * *

It is objected that the notices were insufficient; no time is named at which the proposed by-law is to be considered or passed: that the last of the publications in the Peterborough paper was on the 5th September, and in the Norwood paper on the 11th September, and the meeting at which the by-law was passed, was on 27th September, in the one case, twenty-two days, and in the other sixteen days after the last publication.

The statute does not in terms say that the notice shall mention the time when the council will pass or consider the by-law. It is argued, however, that a direction to give *notice* of an intended by-law must necessarily mean that the ratepayers are to be informed of the time. If notices are to be posted up and published "one month previously," this last word must mean previous to some named time, coupled as it is with the duty of hearing parties petitioning to be heard.

I feel the force of this objection. A general announcement that the council intended to pass a by-law for this purpose conveys no information to the public as to when it is to take place—in a month or six months, or at any future time the council may choose to take the matter up.

According to this, it would be sufficient to make this general announcement, and after the posting up and the four successive weeks' publication the by-law could be passed at any time.

I think the Legislature must have certainly meant by the words used to have required a time to be named at which those interested could attend and be heard.

In other parts of the Act, such as sections 284 and 512, it seem clear that notice of the time should be given.

Now here there were no means of guessing at the proper time from the published notices. The by-law was not considered or passed at the end of the four successive weeks' publication, so that any person desiring to be heard would be bound to obtain by personal enquiry the necessary information, which I think the statute required the council to give to him in the published notices. *Ianson and Corporation of Reach*, 19 U. C. R. 591, states that the time ought to be stated at which the by-law would be considered or passed.

Then it was sworn that the petitioner Birdsall was told by the clerk that the by-law would be considered on 27th September.

To this Birdsall answers that the clerk had told him that there would be a meeting on 27th September to consider the by-law, but that he was told they had not yet got Lynch's bond to indemnify them. (which they afterwards did get), and that Powell said he did not think he could get the bond, and that he (Birdsall) thought nothing would be done, and he told Powell he was obliged to go to Ottawa, and would not be back by that time. The matter had been several times adjourned before after days being fixed.

I think the proper legal notices were not given. The only point is, whether the relator can be heard to object.

This point is not very clearly settled by authority. Most of the cases involve a doubt as to whether the notices were duly published or not. In such cases the fact of the relator having actual knowledge of the time fixed turned the scale against the application, and the Court declined to interfere. There is a good summary of the cases in *Mace and The County of Frontenac*, 42 U. C. R. 79, in my brother Wilson's judgment.

I have found no express decisions to the effect that the mere fact of the relator having knowledge *aliunde* of the matter improperly omitted from a notice which the law

required to be given as a condition precedent to the right to pass the by-law, is a sufficient answer.

If so, I do not think this case is one in which such a principle should be absolutely adopted. Where the objection does not appear on the face of the by-law, the Court has exercised its discretion in quashing or refusing to quash for matters extrinsic.

If the knowledge by the relator is an answer in itself, then in such cases as *Mace and The County of Frontenac*, where the by-law was set aside for defective notice of the time of holding the poll, it would have been a good answer to shew that he was well aware of the time.

As a matter of fact I am not satisfied that the relator Birdsall should be held, on this evidence, to be disqualified from moving against a proceeding so manifestly affecting his property, nor am I satisfied with the alleged notice to him, under all the circumstances and conduct of the case. It must be remembered also that a large number of other persons are directly interested in preventing the closing of this road. Mr. Lynch seems to be the persistent urger of the measure, and the councillors have gone the length of taking a bond of indemnity from him and another in a large penalty "against loss, costs, charges, damages, and expenses, which it may sustain and be obliged to pay by reason of the stopping up and closing of said road." This bond was taken the day before they passed the by-law.

I am of opinion that this application to quash is made on Birdsall's behalf in good faith in his own interest and that of others directly interested: that it is a matter of very great importance to him, and to such others; and I think he and they are entitled to hold the council to a reasonable compliance with the statutable directions.

I think the law, in a case like this, has gone no further than to leave such a point to the discretion of the Court. As far as my discretion is concerned I am of opinion that the by-law should be quashed, with costs.

As far as Farrar is concerned as a co-relator, I think the

answer as against him is sufficient. I think from the costs payable to the relators should be deducted any costs the taxing officer may find have been occasioned by Farrar's intervention or by his examination, from which it appears that he was improperly brought forward.

I have not noticed any of the other objections.

Rule accordingly.

EASTER TERM, 43 VICTORIA, 1880.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

SNARR V. SMITH.

*Sale of goods—Trove against assignee in insolvency—Absence of bill of sale
—Change of possession.*

In trover for goods against an assignee in insolvency, *Held*, following *In re Barrett*, in Appeal (not yet reported,) that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do.

It was alleged that the plaintiff, who was living with his mother, gave the horses in question to her for his board, but no price was fixed for them, and they were kept at the house and used by the plaintiff as before: *Held*, that there was no sufficient change of possession to dispense with a registered bill of sale, and the sale was void as against the assignee in insolvency of the plaintiff.

TROVER for two horses.

Pleas: Not guilty, and traverse of property.

Issue.

At the trial at Toronto, in June, 1879, before Galt, J., without a jury, it appeared that the plaintiff was the mother of one George Snarr, who became an insolvent in March, 1879.

He and his brother had been in business in Toronto. His father carried it on before his death. He lived always at home with his mother and sisters, and owned these horses.

About a year and a half before the trial, in December, 1877, or January, 1878, while they were all living together, the plaintiff and her daughters living with her, the latter were dissatisfied as to money from their father's estate, and as the insolvent was not paying anything for his board, he said to plaintiff he would give her the horses and all belonging to them for his board.

No account was taken of what he owed for board, nor any value named therefor. He said before that nothing was ever thought about board. He said he gave her the horses: that no price was fixed for them: that he was to pay the man and the horses' keep, and he could use them any time she did not want them. He only used them once or twice a week. There was no writing; the horses were kept as before at the house, and he paid the man. He said he had no idea of insolvency at that time.

Plaintiff said she let him use the horses just as he pleased after he transferred them to her. He always had kept the horses. She kept the man, and he paid him. She said: "The only change was, that they were to be mine."

The defendant, as assignee, had taken possession of the horses and refused to deliver them to plaintiff on demand.

It was objected that there was no actual change of possession or delivery, and no writing.

The learned Judge found that the horses at one time were the son's property, and that about a year and a half ago the son gave them to his mother: that there was no actual change of possession, the possession remaining as it was before: that the transaction was a *bond fide* one between the parties; and he entered a verdict for plaintiff for \$600; but, as he was not sure that the transaction was valid under the Chattel Mortgage Act, he reserved leave to defendant to move to enter a verdict for him.

In Trinity Term *Pearson* obtained a rule to enter a verdict for the defendant, or for a new trial, on affidavits.

In Michaelmas Term following, *Beaty*, Q.C., and *Cassels*, shewed cause. The assignee, claiming title through the

insolvents, cannot set up the want of a registered instrument, as required by the Chattel Mortgage Act; and even if he can, the evidence shews that the horses were sufficiently in the possession of the plaintiff to require no further act or transfer to give her actual and continuous possession, and therefore no registered instrument under the Act was required: *Martin v. Moore*, 27 C. P. 397; *Reid v. McDonald*, 26 C. P. 147; *Richardson v. Gray*, 29 U. C. R. 360.

McCarthy, Q.C., contra. The evidence did not warrant the finding of a *bonâ fide* transfer; *May* on Fraudulent Assignments, 149; *Anderson v. Maltby*, 2 Vesey 244, 255. There was no actual and continuous change of possession, as required by the Chattel Mortgage Act; and the assignee, as representing the creditors, although deriving title through the insolvents, cannot take advantage, on behalf of the creditors, of the Act: *Bertram v. Penlry*, 27 C. P. 371; *Re Andrews*, 2 App. 25. As to evidence of change of possession: *Heward v. Mitchell*, 10 U. C. R. 535; *Doyle v. Lasher*, 16 C. P. 263; *McLeod v. Hamilton*, 15 U. C. R. 111; *Carscallen v. Moodie*, 15 U. C. R. 92.

May 21, 1880. HAGARTY, C. J.—We have delayed the decision of this case, as we were aware that the principal question, as to the right of the assignee in insolvency to object to the absence of a bill under the Act, was before the Court of Appeal.

That Court has since last Term decided, *In re Barrett*, (not yet reported,) that the assignee can raise this objection, as we understand it, in the same manner as execution creditors or subsequent purchasers for value.

As the defendant here is now held to have this right we can hardly see how the objection can be surmounted.

There was no pretence here of any actual or continued change of possession. Everything in the family went on precisely as before the alleged transfer. Nothing could have been done more loosely. No amount was stated as due, nor, in fact, was anything due for board; no price was

placed on the horses; no definite agreement for future board. All may be summed up in this: the son, in answer to some dissatisfaction as to the way the family was living, says that his mother may have the horses for his board.

As against an execution creditor of the son, we cannot see how such a transaction could be supported under our statute.

The law is very clearly laid down in *Doyle v. Lasher*, 16 C. P. 266, and most of the cases to that date are there noticed. The facts there were much stronger in favour of the transferee than here. A man bought from a farmer a number of sheep; paid \$15 out of \$41, and left them on the farm till he came back and paid the balance. He marked them with red paint as his property, and they were separated by the farmer from the rest of his sheep and put in a separate field. Before final delivery they were seized in execution against the farmer. The Court held there was no sufficient actual and continued change of possession under the statute. Wilson, J., in giving the judgment of the Court, at p. 270, says: "No one could have told in his dealings with the debtor that he was not just as much the owner after the sale as he was before it. * * The very mischiefs intended to have been removed and provided against by the statute have all been permitted to continue here."

Ranney v. Moody, 6 C. P. 471, may also be referred to.

It was urged for plaintiff that where members of a family live together, and one in good faith sells a chattel to the other, there is as much change of possession as the position of the parties admits of.

No case has been cited to bear out such a distinction.

So long as such an authority as *Doyle v. Lasher* remains binding upon us, we must, we think, hold that a case like that before us must be governed by the principles there laid down.

It would be a singular state of the law if we should hold that the Bill of Sale Act was satisfied by what took place between the plaintiff and her son, and the unfortunate

purchaser of the sheep in *Doyle v. Lasher* was defeated in his claim.

We think the rule must be absolute to enter the verdict for the defendant.

Rule accordingly.

FERGUSON V. VEITCH.

Seduction—Evidence of defendant's means—New trial.

Held, following *Hodsoll v. Taylor*, L. R. 9 Q. B. 79, that in an action for seduction evidence as to defendant's means is inadmissible; and that evidence of the kind having been received, defendant was not to be prejudiced in his application for a new trial because his counsel had, after having done his best to exclude the evidence, examined defendant on the same subject with a view to disproving the estimate placed on his means.

THIS was an action for seduction of the plaintiff's daughter.

At the trial, before Armour, J., at the Spring Assizes at Owen Sound, a witness for the plaintiff was asked as to conversations with defendant respecting his means or property.

This was objected to, and the learned Judge, after clearly warning plaintiff's counsel of the probable inadmissibility of the questions, admitted them at his urgent request and instance.

Evidence was then obtained as to defendant's statements as to the number of thousands of dollars he was worth.

His counsel, protesting against the admissibility of such evidence, examined defendant afterwards on the same subject, to shew he was not so wealthy.

A verdict for \$1200 was given.

May 21, 1880. *Bethune*, Q.C., obtained a rule *nisi* for a new trial, on the ground of the admission of this evidence.

June 1, 1880. *J. K. Kerr*, Q.C., shewed cause. The evidence, even if admitted, would not have affected the verdict. But the evidence was admissible. *Hodsoll v. Taylor*, L. R. 9 Q. B. 79, is not against this view. That is in furtherance of the old doctrine that the position or rank, and therefore the means, of the defendant can be shewn.

Creasor, contra. The principle underlying damage is, what is the injury to the plaintiff? The facts of this case did not justify such a verdict: *Mayne*, on Damages, 3rd ed., 433.

June 5, 1880. HAGARTY, C. J.—*Hodsoll v. Taylor*, L. R. 9 Q. B. 79, is a direct authority in defendant's favour.

Interrogatories as to defendant's means were objected to and disallowed. It was conceded that the same rule applied as to questions at the trial.

Blackburn, J.—“I am clearly of opinion that the interrogatory asking defendant, in effect, ‘How rich are you?’ is not admissible as in any way affecting the plaintiff's case.

The jury, no doubt, would give higher damages against a rich man, and the defendant's means do in general, in some way, come out at the trial. That we cannot help. The true measure is the amount of compensation to be paid to the plaintiff for the injury sustained by the seduction of his daughter; and in an action of tort it should be immaterial, as Lord Mansfield said, whether the damages came out of a deep pocket or not.”

It was also held that evidence may be given of “the situation in life of the parties.”

In answer to the suggestion that the means of the defendant always came out at the trial, Lord Blackburn said: “It is certainly no reason why we should allow an interrogatory as to a question which, if asked and objected to at *nisi prius*, would most certainly not be allowed.”

We were pressed, on the argument, with the point that this answer had really no influence on the finding, and we are reminded that the law permits us to so hold.

But we must not speculate too widely on such a point. Counsel persists in getting improper evidence before the jury, and we think, in such a case as this, they must take the consequences.

It may be that the evidence did not really affect the verdict, but, on the other hand, it may have so operated.

We think that defendant's counsel, having done his best to exclude the question, is not prejudiced by his examining his client on the same subject with a view of denying the estimate placed on his means.

With reluctance we feel compelled to make the rule absolute for a new trial, without costs.

CAMERON, J., concurred.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

Rule accordingly.

MARTIN QUI TAM V. THE CONSOLIDATED BANK.

Security for costs—R. S. O. ch. 50, s. 71—Practice.

An order for security for costs cannot be obtained under sec. 71 of the Common Law Procedure Act (ch. 51, R. S. O.) upon an affidavit made by the defendant's attorney. That section requires the affidavit to be made by the defendant personally.

An application made upon the affidavit of the solicitor of defendants, a corporation, was therefore refused.

THIS was an appeal from an order of Mr. Dalton in Chambers. The application to Mr. Dalton was to compel the plaintiff to give security for the costs of the action, under R. S. O. ch. 50, sec. 71. The action was for penalties under the Stamp Acts.

The application was made on the affidavit of defendants' attorney, that he had demanded security, that the action was for penalties, that he verily believed that the plaintiff was not possessed of property sufficient to answer the costs, &c., and that he was instructed and believed that defendants had a good defence on the merits.

This was supported by the affidavit of a sheriff's officer as to plaintiff's means.

After hearing the parties, Mr. Dalton discharged the summons.

May 27, 1880. *J. R. Roaf* shewed cause. Sec. 71 of ch. 50, R. S. O., requires that the motion be made upon an affidavit of the defendant applying, and if the defendant be an individual, the affidavit must be made by him: *Frederici v. Vanderzee*, L. R. 2 C. P. D. 70. If the Legislature had intended to make this section apply to corporations, they would have used words for that purpose, as in the same statute they have provided means for service upon corporations, and also for examination of officers, thus shewing that corporations were considered by them in drawing the Act. This is an application for special relief, and not one incidental to every suit, as was the case

in *Kingsford v. Great Western R. W. Co.*, 10 L. T. N. S. 722, and this case comes exactly within the judgments given in *Bank of Montreal v. Cameron*, L. R. 2 Q. B. D. 536. Where the meaning of a statute is plain, effect must be given to it, however unreasonable the consequences may be: *Morrell v. Wilmott*, 20 C. P. 378.

J. K. Kerr, Q.C., and *C. J. Holman*, contra. *Kingsford v. Great Western R. W. Co.*, 10 L. T. N. S. 722, was an application under words similar to those in this section; and there the application was granted on an affidavit of the attorney. Sec. 174 of ch. 50, R. S. O., taken with sub-sec. 13, sec. 8, of the Interpretation Act, shews that under the wording of this section, the affidavit may be made by or on behalf of the party applying: *Tiffany v. Bullen*, 18 C. P. 97.

June 26, 1880. HAGARTY, C. J.—Section 71 says, “In any action or suit in which the plaintiff sues as an informer * * the person so sued, or his agent or attorney, may apply to the Court * * for security for costs, *upon an affidavit, made by the defendant* applying, shewing to the Court that such action or suit is brought to recover a penalty, *and that in the belief of the deponent* the plaintiff or informer is not possessed of property sufficient to answer the costs of the suit * * *and that he (the said defendant) has a good defence to such action or suit upon the merits, as he is advised and believes,*” &c.

The point presented for our decision is, whether an affidavit by the bank solicitor is sufficient to support the application under this section.

It is of course impossible that the affidavit could be made by the defendants, a corporation aggregate.

The Interpretation Act, sec. 8, sub-sec. 13, says, “the word persons shall include any body, corporate or politic, or party * * to whom the context can apply according to law.”

Notwithstanding Mr. Kerr's argument on the wording of this 71st section, I am of opinion that the statute requires

the affidavit of the defendant, and that "the belief of the deponent" does not mean or include the belief of the attorney or agent making the application.

The latest authority is *The Bank of Montreal v. Cameron*, L. R. 2 Q. B. D. 536, decided in April, 1877. Order 24, rule 1, directed that when defendant appeared to a specially indorsed writ of summons, the plaintiff might, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on defendant to shew cause why the plaintiff should not be at liberty to sign final judgment for the amount indorsed. The affidavit was made by the secretary of the company. The Court of Appeal held this was not sufficient.

Lord Coleridge said: "It is admitted that the affidavit is not within the terms of the rule, and it manifestly is not within the literal terms, but we are asked to say that it is within the spirit of the rule. I decline to enquire what the framers of this rule meant beyond what is to be gathered from what they have said."

Bramwell, L. J., says: "The words are simply, 'the plaintiff may on affidavit, swearing that in his belief,' do so and so: that may well mean only a plaintiff who is capable of swearing to his belief. It may exclude corporations if the context will not admit of that construction, or it may include them if the context will admit of it. Now, are the words here capable of application to a corporation? The only way that this can be done, is, by construing the words 'his belief' into 'his, the deponent's, belief.' The consequence of such an interpretation would be, that where the plaintiff is a single person, some one else might make the affidavit on his behalf. But, is it possible to say, reading this rule in its plain meaning, that a plaintiff might make this affidavit by his clerk? If, then, we cannot include corporations without extending the same construction to all plaintiffs, we cannot hold that the rule includes corporations."

Butt, L.J., who was one of the framers of the rule, concurred, regretting that corporations were not provided for.

Kingsford v. Great Western R. W. Co., 16 C. B. N. S. 761, chiefly relied on by the defendants, is discussed and explained as being a decision on a matter of the general conduct of the cause, viz., to obtain discovery.

Bramwell, L. J., adds: "It is very much better to abide by the plain meaning of the words, than to stretch them to meet a case which they obviously do not suit; and let the oversight, if it be one, be set right by the proper authority."

Three months before, in *Frederici v. Vanderzee*, L. R. 2 C. P. Div. 70, the same rule was in question. The plaintiff was in Smyrna, and his attorney made the affidavit. The Common Pleas Division held it insufficient, and the Court of Appeal took the same view. Cockburn, C.J., said: "There is here no affidavit as to the belief of the plaintiff, but only as to the belief of the solicitor." Grove, J., said: "If the solicitor's affidavit is sufficient, why not that of a managing clerk, or any clerk who happens to know anything of the business, and has a belief in the matter? It must be remembered that this is not a proceeding of common right, but is a summary proceeding of an exceptional character."

We may also refer to the remarks of Richards, C.J., in *Tiffany v. Bullen*, 18 C. P. 96. We also refer to *Freehold Loan & Savings' Co. v. Bank of Commerce*, 44 U. C. R. 284, and the case there commented on, *Bank of Toronto v. Macdougall*, 15 C. P. 475.

There is a short article in the Law Times, April, 1877, p. 455, commenting on *Bank of Montreal v. Cameron*.

We feel bound to dismiss the appeal, and to uphold the decision of Mr. Dalton.

CAMERON, J., concurred.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

Appeal dismissed.

BELL V. IRISH.

Distress for rent—Justification as owner—Estoppel.

Where a party distrained, as landlord, on goods which as a matter of fact had, by subsequent agreement between himself and the tenant, but before the distress, become his absolutely, *Held*, that he might justify the taking on this latter ground.

ARMOUR, J., dissenting, on the ground that the instrument under which the defendant claimed the goods, set out below, had not the effect of transferring the property in them to defendant.

Per CAMERON, J.—Where a plaintiff claims double value for distraining when no rent was due, he must make such claim at the trial, and ask to have the jury directed upon it.

DECLARATION, first count, against defendant as plaintiff's landlord, for distraining and selling plaintiff's goods when no rent was due. Second count, trespass to goods. Third count, wrongful conversion of goods.

Pleas. 1. Not guilty, by statute 11 Geo. II., chap. 19, sec. 21.

2. Goods were not the plaintiffs', as alleged.

3. Leave and license.

Issue.

At the trial at Cobourg, before Burton, J. A., and a jury, it appeared that the plaintiff was tenant to the defendant of certain premises for ten years from the 1st day of March, 1874, under an indenture of lease, dated 10th September, 1873, signed and sealed by both parties, at a rent of \$270 a year, payable, \$135 on the 1st of October and March: that on the 4th October, 1878, the plaintiff executed to the defendant a chattel mortgage on goods therein described, whereby it was recited that the plaintiff was indebted to the defendant in the sum of \$789, for rent due and owing under the lease, as follows: \$114 on 1st March, 1876, and \$135 on 1st October, 1876, and \$135 on each of the half-yearly days of payment up to and inclusive of 1st October, 1878, and that there would be due on the 1st March, 1879, the further sum of \$135, and that it was agreed to secure by the said mortgage the sum last mentioned as well as the first mentioned sum, in all the sum

of \$924 : proviso for redemption on payment by plaintiff to defendant of \$789, with ten per cent. interest from 4th October, 1878, on the 4th day of October, 1879, and \$135, without interest, on 1st March, 1879.

It also appeared that on the 26th August, 1879, the parties entered into a further agreement, whereby it was declared the plaintiff delivered and sold to the defendant certain goods, the property in the chattel mortgage, which the defendant accepted in full satisfaction and settlement of all the rent specified in and secured by the chattel mortgage aforesaid, on condition that the defendant should finish harvesting and drawing in and threshing all the crop then growing on the lot, and would deliver to defendant, or his agent, wherever specified or ordered by him, grain and other produce enough, at the Woodville market price, as soon as the same could be ready for market, or within the space of one month from that date, to pay the year's rent of \$270 and the year's taxes, and the amount of debt and costs of a certain judgment, *Butler v. Bell*, for which the bailiff of the Division Court of the county of Victoria levied on the aforesaid crop on the 23rd of May last, the said defendant agreeing to settle or get an assignment of the said judgment. And the plaintiff agreed to give up immediate possession of the pasture field and other fields, as cleared of grain, and of the house and other buildings, on or before the 1st of November then next, and possession of the back or south part of the same for an incoming tenant or for the working of the farm. The plaintiff agreed that he would only hold possession of the aforesaid crop and produce of the farm as agent for the defendant, and would not sell, or attempt to sell or dispose of the same, only as specified, until the aforesaid rent and other claims were settled.

On the 4th of October, 1879, the defendant gave written notice to the plaintiff that he had appointed one Cameron his agent to receive the full amount of grain raised on the the farm according to the former agreement, and the following debts :

Taxes for the year 1879	\$41.84
<i>Butler v. Bell</i>	53.03
Arrears of rent	185.00
	<hr/>
	\$229.07

On the 9th of October, 1879, the defendant, by his bailiff John W. Pattenden, distrained for the sum of \$134.80, rent due to him on the 26th of September, 1879, and the bailiff seized a quantity of wheat, a rake, a patch of potatoes, a patch of turnips, a patch of corn, some old harness, a quantity of hay, whiffletrees, and neck-yoke.

It appeared from the evidence of the defendant that he had received in the month of September, \$135, which, if the lease remained in force, would have paid the rent due to the 1st of October. The rent distrained for would not, under the lease, fall due till the 1st of March, 1880, but, according to the terms of the agreement of the 26th of August, it became due on the 26th of September, 1879.

The plaintiff's wife swore the \$135.20 was paid in two sums: \$119.20, the proceeds of oats, and \$16 she paid in cash; and she stated she paid it, and defendant accepted it, as the half-year's rent due in October, while defendant contended he received it on account of the agreement of the 26th of August. It also appeared that the amount of the execution—*Butler v. Bell*—was paid to defendant before the distress.

At the close of the plaintiff's case the defendant's counsel moved for a nonsuit, on the ground that upon the documentary evidence the plaintiff failed to make out a case. The learned Judge was of opinion that plaintiff was not entitled to recover, but left the case, on the question whether the defendant assented to the appropriation of the payment of the \$135 in September to the October rent, that is, as a payment under the lease and not under the agreement, to the jury, reserving leave to the defendant to move to enter a nonsuit.

The jury found for the plaintiff, with \$250 damages. There was no objection to the Judge's charge.

May 21, 1880. *J. K. Kerr*, Q.C., obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered pursuant to the leave reserved, or a new trial had between the parties, on the ground that the verdict was contrary to law and evidence.

P. S. Martin also moved for a rule *nisi* to shew cause why the verdict should not be increased to \$500, on the ground that the action was for distraining and selling the plaintiff's goods when no rent was due, and the evidence shewed the value of the goods distrained was \$250; and the plaintiff, under the statute 2 W. & M., 1 sess., ch. 5, sec. 4, was entitled to double the value. This rule was directed not to be issued, but the question was to be argued upon the defendant's rule, and under that he was to obtain the relief sought, if entitled to it.

June 2nd, 1880. *P. S. Martin*, in support of the plaintiff's contention, that the verdict should be increased to \$500, urged that the action was really for distraining when no rent was due, no evidence being given on the other counts; that the evidence clearly proved the actual value of the goods seized and sold to be \$250, and that the plaintiff was therefore entitled to have this amount doubled. He cited *Attorney-General v. Hatton*, 1 McC. 214; *Buckle v. Bewes*, 4 B. & C. 154; *Barnard v. Moss*, 1 H. Bl. 107. In opposing defendant's rule for a nonsuit, he urged that the defendant having distrained upon plaintiff's goods for rent was estopped from now saying that the goods were his (defendant's) own under the agreement, citing *Gibbs v. Crawford*, 8 U. C. R. 155, and that defendant's whole course of action was inconsistent with his belief that he was dealing with his own goods: that the agreement was only a conditional one, which was being carried out by plaintiff, and at any rate gave no power of distress, but only a right of action if any breach was committed; also, that the question left to the jury was, whether the defendant accepted the payment of \$135 from plaintiff in satisfaction of the rent under the lease, and abandoned the agreement:

if so, the plaintiff was entitled to recover: that the jury found this question in favour of plaintiff, and that no objection being raised to the Judge's charge, and the jury having found for the plaintiff, the verdict should not be disturbed: that the property in the crops, &c., remained in the plaintiff, and that all the defendant could have would be a lien upon them for the then claims, but no right to interfere with them in any way; and that at any rate the defendant did not consider the time, 26th of September, as of the essence of the contract, because he did not appoint his agent to receive them until the 4th of October, and this being so, he had no right to seize them upon the 9th of October, not having given the plaintiff time between the appointment of his agent and the issue of the distress warrant to deliver grain enough to satisfy the rent. In any case the plaintiff ought to recover for the goods not in the agreement.

J. K. Kerr, Q.C., argued that the effect of the agreement was, to vest the property in the crops, &c., in defendant, and he would have a right to take them in any way he might see fit: that the agreement created a new term, at \$270 per annum, payable in one month, and that only half that amount being paid, defendant had a right to distrain: that, in answer to the application of plaintiff to double the verdict, there was no evidence to shew that the jury had not done so in their verdict, and that the Judge not having been requested to tell the jury to do so, it was now too late to apply for it.

June 26th, 1880. CAMERON, J.—The plaintiff is not entitled to have his motion acceded to. He did not request the learned Judge to direct the jury to find double value for the plaintiff if they found no rent was due, and we cannot say that the jury, in awarding \$250 to the plaintiff, found that to have been the actual value of the goods, and that they did not include therein anything for the alleged wrongful seizure by the defendant. At most, we could only send the case down for trial again, and the plaintiff

does not desire that. The jury ought to have been directed upon the point: *Masters v. Farris*, 1 C. B. 715.

Upon the defendant's rule the question is, what was the position of the parties to each other, and their respective rights under the agreement of the 26th of August, 1879? It is quite clear, assuming the rent due previous to the 1st of October, 1879, was settled by the delivery to, and acceptance by, the defendant of the property mentioned in that agreement, there was no rent due at the time of the distress. The plaintiff is therefore entitled to recover the value, or double value, of any property of his that may have been taken, unless by force of the agreement the term under the lease was not only surrendered but a new term was created at the fixed rent of \$270, to be paid within one month after the date of the agreement, in other words, on the 26th of September, as assumed, by the defendant, or unless the property distrained was, under the agreement, the defendant's own. As to the first point, while the agreement does in effect provide for a surrender of the term, it does not create a new term at a fixed rent. It is an agreement, on the one hand, to accept certain goods, the appropriation of the crops then in the ground as far as necessary to pay three several amounts; viz., taxes for 1879, \$41.84; amount due on Butler's execution, \$53.03; and rent of the year 1879, \$270, and the giving up of the place, part at once, and the whole by the 1st of November, 1879, in full satisfaction of all rent accrued due and accruing due for 1879; and, on the other hand, to give up the demised premises, to take care of the crops, to harvest and thresh them, and apply them under the direction of the defendant, so far as necessary, taken at their market value, to pay the three claims above mentioned; but there was no new demise or creation of a new term on the part of the defendant. The effect of the provision, that the plaintiff would only hold possession of the crop and produce of the farm as agent for the defendant, was to give the latter the crops till his claim was paid, and the taking of them under the distress would not give the

plaintiff a right to maintain trespass, trover, or the special action for double value. But all the goods sold were not covered by or included in the agreement; the rake, the whiffletrees, and neck-yoke, did not pass thereby to the defendant. He was not therefore justified by the agreement in seizing these, and the plaintiff was entitled to recover for the wrongful seizure. It may be, too, having paid half of the rent for 1879, and the amount of the execution, he has a claim in some form of action, if not in those embodied in the declaration, for the difference between the actual value of the goods distrained and sold and the amount realized thereon, or for the surplus after paying defendant's claim without costs. These considerations were not presented to the jury, nor the attention of the learned Judge directed to them. There ought, therefore, to be a new trial, with costs to abide the event, unless the plaintiff elects to reduce his verdict to the value of those articles not covered by the agreement, say \$15, with Division Court costs, in which case the rule will be discharged, without costs; the defendant not to set off costs.

I have not overlooked the plaintiff's contention, that by reason of the distress for rent the defendant is prevented from denying the goods seized were in part his own. *Gibbs v. Crawford*, 8 U. C. R. 155, is an authority in support of this contention; but in *Wakefield v. Lynn*, 5 C. P. 410, it was held otherwise. The cases are not distinguishable in principle. In the former, the landlord distrained goods off the demised premises for rent in arrear, and was therefore a trespasser; but he was mortgagee of the goods, and attempted to shew this under a plea that the goods were not the plaintiff's. The judgment is very briefly noted. It is: "Defendant was precluded by the distress from claiming the goods as his own under the bill of sale; that having abandoned his lien upon them and treated them as the goods of the tenant, he could not afterwards repudiate the distress, and revert to his claim under the mortgage." The authorities referred to in the note of the judgment do not bear out the result arrived at.

In the case of *Wakefield v. Lynn*, the defendant, a mortgagee of goods, caused the mortgaged goods to be seized in execution, after the mortgagor had assigned the goods to third parties; and it was held the seizure under the execution did not prevent his resorting to his chattel mortgage to protect him from the suit brought against him by the assignee of the mortgagor.

I do not see any distinction between the position of an execution creditor and a landlord in this respect, and it does not accord with one's notion of natural justice to hold that an owner of goods should be liable to an action when he takes them simply because he asserts he takes them for one cause instead of another, no one being prejudiced thereby.

The true construction of the agreement is not that the plaintiff, as he contends, should deliver the grain and produce as soon as the same could be got ready for market, or pay the defendant the year's rent within one month, but that a delivery should take place, as soon as the same could be got ready, or, at latest, within one month, of sufficient grain to pay the amount agreed upon. The intention was not to delay the delivery beyond a month from the date of the agreement. The grain and produce were the source from which the payment should come.

HAGARTY, C.J.—As is said in *Trent v. Hunt*, 9 Ex. 14, it is not the right that a man says he has, but the right he has, that is to govern.

I cannot see how the fact of defendant distraining on plaintiff's goods prevents his justifying the taking on other grounds, viz., that the property or chattels was his, and he had the right to take them.

This Court in 1851, in *Gibbs v. Crawford*, 8 U. C. R. 155, decided that a landlord who has seized goods for a distress off the premises was estopped from claiming them as his own under a previous bill of sale. The report is only a few lines, and the authorities referred to do not apparently bear out the doctrine.

Several years later, *Wakefield v. Lynn*, 5 C. P. 414, was decided by Sir J. Macaulay, and seems to be inconsistent with the earlier case, which is not cited. It is true that in the Common Pleas case it was not a case of a landlord distraining, but of a mortgagee of goods directing the sheriff to seize on an execution against the mortgagor.

Trent v. Hunt was decided after *Gibbs v. Crawford*, and the law is there much discussed.

In the present case the defendant had not, I think, any intention whatever of abandoning his claim under the agreement. He says that he issued the warrant because he did not know of any other way to stop plaintiff taking the things away. His warrant specifies no particular goods, but merely directs a distress on the goods and chattels on the place "liable to be distrained for rent." As a matter of fact there were some small things seized not covered by the bill of sale.

I am of opinion that, as between these parties, and on this evidence, defendant is not estopped from setting up his real title. We can understand how a person, by his dealing with property, and asserting a right wholly inconsistent with some other right claimed by him, might create an estoppel against his setting up the latter right; but nothing of the kind appears here.

As to the agreement, I think its effect was, as between plaintiff and defendant, to vest the property in the crops, &c., in defendant, the plaintiff having a right to the surplus after paying defendant's claims.

ARMOUR, J.—I am unable to come to the conclusion that the instrument of the 26th of August, 1879, had the effect of transferring the property in the goods distrained, or any of them, to the defendant. I think, therefore, the verdict should not be disturbed: it is not a case for double damages.

Rule absolute for new trial.

THE TRUST AND LOAN COMPANY V. LAWRASON ET AL.

Mortgage--Distress clause.

A mortgage was drawn under the Act respecting Short Forms of Mortgages, with the addition of a clause that the mortgagor did "attorn and become tenant-at-will to the company, subject to the said proviso" [for redemption]. The mortgagees never executed the mortgage, which named a day for payment of principal more than three years from the date of the mortgage, and intermediate days for payment of interest half-yearly in advance.

Held, CAMERON, J., doubting, that a tenancy-at-will was created at a fixed rent equivalent to the interest, for which the mortgagee had all the remedies of a landlord, including the right to a year's rent, against defendant, an execution creditor, who had seized the mortgagor's goods upon the land.

This was a case stated for the opinion of the Court.

The facts were as follow : By indenture, dated the 23rd of March, 1877, expressed to be made under the Act as to short forms of mortgages, R. S. O ch. 104, one Christie conveyed to the plaintiffs certain lands, with a proviso for redemption on payment of \$34,000 on the 1st of April, 1882, and interest thereon at eight per cent. per annum in advance half-yearly, on every 1st day of April and October. The mortgage contained, among others, form 7 of the Act, that on default the mortgagees should have quiet possession ; form 14, that the mortgagees, on default of payment for two months, might, on one month's notice, enter on and lease or sell the lands ; and form 15, that the mortgagees might distrain for arrears of interest, and the words that " the mortgagor doth attorn to and become tenant at will to the company, subject to the said proviso ;" viz., the proviso for redemption. The mortgagor had been in possession from and at the time of the execution of the mortgage till at and after the seizure by the sheriff hereinafter mentioned. In December, 1879, the sheriff, under executions against the mortgagor at the suit of the defendants, seized the goods of the mortgagor on the lands mortgaged. Before sale and removal of the goods, but after the seizure, the mortgagees, claiming as landlords

of Christie, notified the sheriff that they required, before removal of the goods, payment of \$2,720 as for one year's rent, for a year next preceding the notice. On this an interpleader was had, the goods were directed to be sold, and a case was stated for the opinion of the Court, whether or no the mortgagees were entitled to the proceeds of the sale of the goods or of any of them.

Robinson, Q. C., and Marsh, for the plaintiffs. The plaintiffs rely upon the case of *The Royal Canadian Bank v. Kelly*, 19 C. P. 196, and 430, as explained by Mr. Leith, 14 C. L. J. 8, and they submit that the decision of the Court below in that case is good law, in so far as it is necessary for the plaintiffs to rely thereon in the present case. As is shewn by Mr. Leith in his letter to *The Law Journal*, the Court of Appeal reversed the judgment of the Court of Common Pleas, on the ground that the tenancy in that case had terminated more than six months before the making of the distress, and that the distress was therefore contrary to the provisions of the statute in that behalf; and upon the further ground, that as the only claim made for rent was made for interest *qua* rent, and as the day appointed for payment of principal had passed before the commencement of the period for which rent was claimed, in consequence of which the interest was recoverable, not by contract, but merely *qua* damages, therefore the interest was not a fixed sum, and consequently the rent was not a fixed and ascertained sum, and could not be distrained for. There is nothing to indicate that the Court of Appeal decided anything more than this, and as these points effectually disposed of the case before them, it will be presumed that they decided nothing further. Here we are not met with the difficulties that confronted the mortgagees in *Royal Canadian Bank v. Kelly*, for the plaintiffs have made their claim for rent during the currency of the term, and while interest was recoverable by the terms of the contract in the mortgage. There is, moreover, here an express attornment clause, by

which the mortgagor became tenant at will to the plaintiffs. It is therefore only necessary for the plaintiffs to rely upon *The Royal Canadian Bank v. Kelly*, in so far as that case gives a construction to the distress clause contained in the mortgage in question herein. The construction there put upon the distress clause is, it is submitted, correct on principle, and well supported by authority. The only thing that the plaintiffs require to shew, in addition to what is admitted, is, that the mortgagor, by the terms of the mortgage, became a tenant of the mortgagees' at a fixed rent. The question of the tenancy is concluded by the attornment clause, and the only point left to argue is, whether or not there is a fixed rent, which is purely a matter of construction of the mortgage. The attornment is made subject to the proviso for payment. That proviso fixes the rate of interest, and the distress clause, as extended in the long statutory form, empowers the mortgagees to distrain for interest, "*by way of rent reserved.*" This means *as and for rent reserved*; and these three clauses read together fix the rent reserved at the same rate as the interest. The Court should construe the instrument so as to give effect to the apparent intent of the parties to it, and it is apparent here that the whole instrument was intended as a security for money, and that the attornment clause was added to the statutory form of mortgage in order to strengthen the security and provide a more certain means of realizing upon it; and it would now render that provision nugatory, and be contrary to the whole scope of the instrument as a security for money, should this Court put upon the whole mortgage, and these three clauses in particular, the construction contended for by the defendants—that although there be a tenancy, it is one not at a fixed rent. The whole scope and intention of the instrument should be looked at; and such a provision in such an instrument should be construed favourably for the party taking the security. See remarks of Kelly, C.B., in *Morton v. Woods*, L. R. 4 Q. B. 305, 306. All the recent English cases hold that an attornment clause

in a mortgage creates the relation of landlord and tenant, with all its incidental remedies: *Ex parte The Queen's Benefit Building Society, re Threlfall*, W. N., (1880,) May 15th, p. 91; *Re Stockton Iron Furnace Co.*, L. R. 10 Ch. Div. 335; *Morton v. Woods*, L. R. 3 Q. B. 658, affirmed on appeal, L. R. 4 Q. B. 293; *Hampson v. Fellows*, L. R. 6 Eq. 575; and see all the earlier cases collected in the note to *Keech v. Hall*, in *Smith's Leading Cases*, 8th ed., p. 583. It is not a good objection that the mortgage is not executed by the mortgagees, and therefore cannot be a good lease for five years; for in the first place the attornment clause does away with the necessity for execution by the mortgagees, and moreover the instrument would operate as a good lease by virtue of the Statute of Uses: *Morton v. Woods*, L. R. 2 Q. B. 663, 667; *Leith's R. P. Stats.* 392, 393.

Leith, Q. C., contra. The mortgage either gave a mere personal license to take the mortgagor's own goods, or it operated as creating the position of landlord and tenant at a rent, with all its incidents, including the benefit of the statute of Anne, and the right to take goods of third persons. The mortgagee could occupy no intermediate or other position than as licensee or landlord, and in *La Vassaire v. Heron*, 45 U. C. R. 9, it was held at *Nisi Prius* that a mortgagee, as in this case, could not take the goods of strangers, and consequently was not a landlord at a rent. It is more reasonable and consistent with honesty, and a construction more to be favoured, that the parties should have simply agreed that the distress clause should operate merely as a personal license, than that they should have agreed to create a fictitious position of landlord and tenant *at a rent*, in order that the mortgagee might take the goods of third persons. The language of the clause does not coincide with the latter supposition. On that supposition the parties would simply have added to the attornment, or to the possessory clause, No. 17 of the Act, the words, "at a rent per annum equivalent to the interest." The language of the clause is adapted only to a license to seize the mortgagor's goods; and *Chapman*

v. *Beecham*, 3 Q. B. 730, and *Fisher* on Mortgage, 3rd ed., p. 448, support the argument that the reference to the mode of recovery "by distress warrant—as in case of demise—with costs—as in like cases of distress for rent," was intended only as specifying in a concise referential way how the mortgagee should and might, for the interest of both parties, deal with goods seized under the license, instead of leaving that question open and uncertain. The power given to distrain for costs would be unnecessary if there were a tenancy at a rent. If a mere personal license were intended, coupled with concise provisions for seizure and sale, no better form could be framed. *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Hope v. Booth*, 1 B. & Ad. 498; *Sackett v. Barnum*, 22, Wendell, 605. If there were no tenancy *at a rent* then, as the goods were in the custody of the law under execution, the mortgagee could not take them and was not within the statute of Anne. The mortgage could not operate so as that there should be deemed to be a grant of a rent charge; for if the grant of the land be deemed to precede the grant of the charge, the latter is void for want of an estate from which to grant the charge: *Freeman v. Edwards*, 2 Ex. 732; *Doe Garrod v. Olley*, 12 A. & E. 481, per Patteson, J.; and if the charge be deemed to precede the grant of the land, the charge would be extinguished: *Clun's Case*, Tud. Lg. Ca., 3rd Ed. 284.

Assuming even that there was an intention to create a tenancy at a rent, a tenancy at will under the attornment clause was not intended, but a tenancy for a term, under the possessory clause No. 17 of the Act. This is evidenced by that clause, and by clause No. 7 of the Act, that on default 'the mortgagee shall have possession, and by the clause No. 14, that on default the mortgagee may enter and sell, all which are inconsistent with a tenancy at will. The case of *Morton v. Woods*, L. R. 4 Q. B. 493, is distinguishable, as there the conveyance was in trust for immediate sale, and there were no such clauses as numbers 7, 14, and 15. The term intended here to be

created, however, exceeded three years, and was void for non-execution by the mortgagee, and as consequently the mortgagor, through the default of the mortgagee, had not the term stipulated for, he was not liable to distress for rent: *Swatman v. Ambler*, 8 Ex. 72; *Pitman v. Woodbury*, 3 Ex. 4. The mortgage could not operate under the Statute of Uses, as suggested by Blackburn, J., in *Morton v. Woods*, as a conveyance to the mortgagee to the use of the mortgagor for the term intended, and on default in payment to the use of the mortgagee, for a corporation cannot stand seised to an use. Even though the position of landlord and tenant were created at a rent, yet the *reddendum* is bad for uncertainty, and as conditional only. The rent is not reserved payable in all events, but only in case interest be unpaid. Moreover, if it be held that under the distress clause, and the covenant for payment given in the Act, there was a lease with a valid reservation of rent, then there would be in ordinary cases two sets of persons entitled at the same time to the same sum on the death of a mortgagee, viz., the executors to the interest, and the heirs to the rent. The legal result also would be in such case that rent would only be reserved, payable in case a collateral sum in gross were not paid to the executors, which would be a bad *reddendum*, as depending on payment of such a sum to persons who were strangers to the estate; all which shews the Legislature intended by the Act a mere license. *Woodfall L. & T.* 348; *Gilbert on Rents*, 54; *Co. Litt.* 213 a, section 345. He also referred to *Clowes v. Hughes*, L. R. 5 Ex. 163.

Robinson, Q.C., in reply. The Statute of Anne, (8 Anne, ch. 14, sec. 1) extends to the case of a tenant under an attornment clause in a mortgage: *Yates v. Rutledge*, 5 H. & N. 249; *Colyer v. Speer*, 4 Moore 473. See also *Munro v. Commercial Building, &c., Society*, 36 U. C. R., p. 469-70.

June 26th, 1880. HAGARTY, C. J.—This case differs from the much discussed *Kelly v. Royal Canadian Bank* in this, that the mortgage here contains the attornment clause, which is not in the other.

It appears to me we must consider that the legal effect is, that the mortgagor conveying thus his legal estate to the mortgagees did also become their tenant-at-will.

The case admits that Christie remained in actual possession of the lands *under and pursuant to the provisions of the said mortgage* from the date thereof until after the directing of this interpleader issue, a period of nearly three years.

It was argued that, as the mortgagees did not execute the mortgage, the agreement for possession till default, as a redemise for a period of five years, could not take effect; but I do not see why this should defeat the previous express attornment as tenant-at-will.

The main question seems to be whether, under the mortgage and the words of our statute, a mere license to take the goods of the mortgagor is given, or whether the relation of landlord and tenant, with all its consequences, is created.

We are not embarrassed here by two considerations that arose in *Kelly v. Royal Canadian Bank*. It is not claimed that the goods of a third person are distrainable, nor that the mortgage has become wholly due, the mortgagor still remaining in possession. As between mortgagor and mortgagee there need not be any difficulty, whether as between landlord and tenant, or between licensor or licensee, the seizure would be valid. But, as at the time of seizure the goods were in the custody of the law in execution, it becomes necessary to decide whether, under the statute of Anne, the mortgagees' claim can prevail; in the words of the Act, were the lands then "leased for life or lives, term of years, at will, or otherwise?"

We are bound, as far as possible, to carry into effect the language and apparent intent of our statute in the expansion of the clause as to distraining for arrears of interest; and if the intent be plain, as evidenced by the language used, we must not allow a purely technical objection, such as the use of the word "heirs," when the interest would go to "executors," to prevail. At all events, when the mortgage

contains words expressly declaring that the mortgagor attorns to and becomes tenant-at-will to the mortgagee, it seems to me to be clear that the Legislature, by the words used, intended to place the mortgagee distraining for arrears of interest in the position of one entitled "to recover by way of rent reserved, as in the case of a demise of said lands."

I have read with much attention the judgment of Mr. Justice Gwynne in *Kelly's Case*, 19 C. P. 196, and the authorities there collected, and some others cited on the argument here.

The unfortunate loss of the judgment of the Court of Appeal, and the faulty recollection of both judges and counsel, after a lapse of nine or ten years, as to its precise effect, render it difficult to say how the appellate court viewed the several questions raised.

I assume that at all events after the mortgage was wholly due the interest was no longer recoverable as of right, but only as damages, and that the goods of a stranger could not be taken therefor; and as the mortgage seems not to have contained a clause of attornment, I am not bound to reject Mr. Justice Gwynne's general view of the law as unsound.

Morton v. Wood, L. R. 3 Q. B. 666, seems to me decisive of the objection as to the non-execution by the mortgagees. Sir A. Cockburn, C.J., says, that "the case of *West v. Fritche*, 3 Ex. 216, shews that when there is a deed of this description, although it be not executed by the mortgagee, yet the mortgagor having attorned and occupied after the deed was executed by him, the relation of landlord and tenant is created. With reference to the intention to create a term, and the failure by reason of the non-execution of the deed, any tenancy for a term not beyond three years may be created without any deed or writing, and in my opinion it is plain that all the tenancy the parties intended to create was a tenancy at will, no more and no less."

Lord Blackburn's opinion is very clearly to the same effect.

Pinhorn v. Souster, 8 Ex. 763, is clear on the general law, and in *Brown v. Metropolitan, &c., Society*, 1 El. & El. 832, Lord Campbell speaks of it as a case "with which we entirely concur."

I do not feel pressed by the objection, that when a mortgagor attorns as tenant to a mortgagee, no express sum is mentioned as rent.

It seems to me impossible to carry out the words of our statute unless we make the amount of arrears of interest as the rent. Surely, *id certum est*, &c., ought to apply.

I agree with Gwynne J. in his view of the meaning of the words used in the statutable extension of the short form, distinguishing between "in like manner as for rent reserved," and "to recover by way of rent as in the case of a demise"—see p. 211—that in fact "the interest shall be payable as rent reserved by the mortgagee as in the case of a demise of said lands from the mortgagee to the mortgagor."

The case of *Clowes v. Hughes*, L. R. 5 Ex. 163, cited by Mr. Leith, merely decides that when the mortgage provides that in case of default the mortgagor immediately thereafter shall hold the premises as a yearly tenant, &c., the mortgagee must intimate or notify him that they intend to treat him no longer as mortgagor but as tenant, and till then they have no right to distrain.

The case of *Pitman v. Woodbury*, 3 Ex. 4, and *Swatman v. Ambler*, 8 Ex. 72, were respectively actions of covenant and debt on covenant for rent, and the defence was, that the lessors had never executed the leases. The decision in effect was, that as the defendants had not got the terms granted they could not be sued in that form of action.

As I am of opinion, on the whole case, that a tenancy at will was created at a rent sufficiently certain, I think the plaintiffs had a right to distrain, and that the decision must be in their favour.

There is a case in the Weekly Notes, p. 91, May, 1880, *Ex parte the Queen's B. B. Society, in re Threlfall*, commented on in Law Times, May 29th, 1880, p. 74, on this attornment clause.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

CAMERON, J.—While I do not dissent from the conclusion arrived at by the learned Chief Justice, I concur therein with great doubt as to its being a just and legal determination of the rights of the parties. The question is one of importance, and affects the rights of many. I think it better, therefore, to resolve my doubts in favour of the plaintiffs, so that if the defendant desires it he may obtain the opinion of a Court of Appeal with as little delay as possible, and without a re-argument before this Court, which, owing to the constitution of the Court at the time of the argument, would be necessary before any judgment could be given that would be decisive of the rights of the parties. As between the plaintiffs and the mortgagor, there can be no question, upon the authorities, of the right of the former to distrain by reason of the express provision in the mortgage giving that right. The doubt arises from the fact that the defendant is a stranger to the mortgage, and has, as an execution creditor, the right to the money levied, unless the Statute 8 Anne ch. 14 applies. This does not apply, unless the relationship of landlord and tenant existed between the mortgagees and mortgagor, and there was a fixed rent. Conceding that by the attornment clause in the mortgage, the mortgagor became tenant at will to the plaintiffs, did he become such tenant at a fixed rent? The clause itself is silent as to rent. It is not essential to a tenancy at will that there should be a rent, and full effect can be given to the intention of the parties, as far as the clause itself is concerned, without importing into it any provision as to rent. Then the clause authorizing the plaintiffs to distrain is unconnected with the attornment clause, except that they are both contained in the same instrument. It does not provide that the plaintiffs may distrain for any fixed rent, but for arrears of interest, and full effect to the clause may be given, as between the plaintiffs and the mortgagor, without reference to the

attornment clause at all. No force, it appears to me, is given to the provision authorizing the plaintiffs to distrain by the statute respecting short forms of mortgages beyond what the agreement of the parties gives it. That statute only declares that the concise expression used in the mortgage shall mean what the further language of the statute sets out—in other words, the words used in the statute must be imported into the mortgage as the language of the parties thereto, and when so imported must operate as if no statute had been passed. Assuming this to be the sole effect of the statute, the provision for distraining alone would not affect the rights of third parties, and would not create the relationship of landlord and tenant between the plaintiffs and the mortgagor; and the provisions of the statute of Anne, which was an Act in aid of landlords, would not apply. This was held in the case of *Cox et al. v. Leigh*, L. R. 9 Q. B. 333. In that case the landlord distrained after the expiration of the term, but within six months thereafter; as authorized by the statute in that behalf; and the Court held that the statute of Anne had relation only to cases where the relationship of landlord and tenant was existing, and not to cases where there was a statutory right of distress. So, unless the attornment clause in the mortgage must be read as providing that the mortgagor became tenant-at-will to the plaintiffs at the fixed rent of \$2720 a year, being the amount of interest payable annually, half-yearly in advance, the plaintiffs are not entitled to the money realized by the sheriff on the sale of the mortgagor's chattels under the execution.

To hold that mortgagees can distrain under the provisions contained in the mortgage in question, after the rights of execution creditors have intervened, is virtually to create such mortgages chattel mortgages upon all the mortgagor's chattel property, while it remains upon the mortgaged premises, without the mortgagees having observed the requirements of the Chattel Mortgage Act, designed for the protection of creditors. The very instant

the mortgage in question was executed, it became in effect a mortgage upon the mortgagor's chattels for \$1360, or six months' interest payable in advance, and after six months of the first instalment of interest was not paid it became a mortgage for \$2720; so that, if he so desired, a mortgagee, where interest is payable in advance, might protect his mortgagor's chattels to the value of the instalment due him, as long as he pleased, against the claims of creditors. Where such a result is possible, I hesitate to come to the conclusion that a mortgagee can, by agreement between himself and the mortgagor, create the relationship of landlord and tenant between them, so as to vest in him all the rights that belong to the position of landlords, to the prejudice of creditors.

Judgment for plaintiffs.

FRYER V. SHIELDS ET AL.

Action for wages—Discharge in insolvency—Privileged claim—Pleading.

To an action by a commercial traveller for wages, defendants pleaded a deed of composition and discharge in insolvency. The plaintiff replied that the claim was privileged:

Held, on demurrer, replication good, as it did not appear that the plaintiff ever gave any express consent to the discharge, and he was therefore not affected by it.

ARMOUR, J., dissenting.

THIS was a rehearing of a judgment of Galt, J.

The declaration was on the common counts, for money payable by the defendants to the plaintiff, for work and services of the plaintiff, by him done and rendered, as a commercial traveller and otherwise, of and for the defendants, and at their request, and for wages due from the defendants to the plaintiff in respect thereof; and for money lent by the plaintiff to the defendants; and for money paid by the plaintiff for the defendants at their request; and for money received by the defendants for the use of the plaintiff; and for interest, and on an account stated.

Pleas:

1. Never indebted.

2. Payment.

3. Alleging that after the indebtedness mentioned in the declaration a discharge in insolvency was executed, not alleging that the plaintiff expressly consented thereto; and also that the plaintiff was scheduled in the insolvency proceedings, and thus brought within the provisions of the Act, and was therefore bound by such proceedings.

Replication: That the plaintiff's claim was privileged, being for wages, and that not having been paid the discharge did not apply.

Demurrer: That the discharge in insolvency releases the defendants from personal liability, and the plaintiff's privileged lien merely attaches to the insolvents' assets in the hands of the assignee.

The case was originally argued

May 7th, 1880. *William Mulock* for the demurrer. The 61st section of the Insolvent Act of 1875 provides that a discharge shall absolutely free the debtor from all liabilities existing against him, and provable against his estate, and which have been set forth in the insolvency proceedings in the manner provided by that section. The debt in question was duly scheduled, as appears by defendants' plea, so that the only question is, whether this debt was provable against the defendants' estate, and was not within the class of debts mentioned in section 63 as not affected by a discharge. This section enumerates certain classes of debts to which a discharge shall not apply, but in this list is no reference to a privileged debt, and the section then goes on to declare what debts are to be computed in ascertaining whether the requisite number of creditors have consented to the discharge; and it uses these words, "nor shall debts to which a discharge under this Act does not apply, nor any privileged debts" be so computed. This is the only reference in this section to privileged debts. If, therefore, a discharge was intended not to apply to a privileged debt, the words, "nor any privileged debts," have no meaning. It is clear, therefore, that these words are used in this section in contra-distinction to the preceding words, which deal with debts not affected by a discharge. The plaintiff's remedy is against the assets in the hands of the assignee, and not against the defendants personally.

G. Kerr, Jr., for plaintiff. The plaintiff has not been paid, and the assignee has parted with the whole estate, so that there is now no fund to which the plaintiff can resort, and the debt being unpaid, the defendants are still liable. At all events, the defendants having obtained a re-assignment of the estate must pay the lien upon it.

May 11, 1880. GALT, J.—This is an action on the common counts, brought by a privileged creditor—that is to say, a clerk—against the defendants to recover the full

amount of his wages for a period which, under section 91 of the Insolvent Act of 1875, is privileged. The plea sets up a deed of composition and discharge duly confirmed. To this the plaintiff replies that the claim for which he sues is privileged, as above stated. To this replication the defendants demurred.

By the 63rd section a discharge under the Act shall not apply, without the express consent of the creditors, to any privileged debt, nor the creditors thereof be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter or thing under this Act; but the creditor of any such debt may claim and accept a dividend thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the insolvent.

It is not alleged in the plea, nor does it appear in the replication, that the plaintiff in this case ever gave any express consent to the discharge of the insolvents; consequently he is not affected by it, and this demurrer must be overruled.

Judgment for plaintiff on demurrer.

May 31st, 1880. The same counsel appeared as before, and the same arguments were addressed to the Court.

June 26th, HAGARTY, C.J.—I am of opinion that the judgment of Galt, J., is right.

The 63rd section must be read all together. It provides for the different cases in which the discharge under the Insolvent Act shall not exonerate the debtor. It declares that privileged debts shall not be computed in ascertaining the sufficient proportion of creditors voting or consenting to the discharge; and permits the privileged creditor to claim and accept a dividend "*without being by reason*

thereof in any respect affected by any discharge obtained by the insolvent."

I think it impossible to give effect to the clause, and especially to these words, if we accept the argument that the insolvent is personally exonerated, and the privileged creditor compelled to seek some most doubtful remedy, by application to the Judge or by proceedings against the assignee.

CAMERON, J., concurred.

ARMOUR, J.—By the 61st section of the Insolvent Act of 1875, it was provided that "the confirmation of the discharge of a debtor in the manner herein provided shall absolutely free and discharge him, after an assignment, or after his estate has been put in compulsory liquidation, by the issue of a writ of attachment, from all liabilities whatsoever, (except such as are hereinafter specially excepted,) existing against him and provable against his estate," &c.

It was not contended before us that the plaintiff's claim was not a liability existing against the debtors and provable against their estate, nor was it contended that it was not a liability from which the confirmation of the discharge of the debtors would not have absolutely freed and discharged them but for the words of exception introduced into the above section, but it was contended that the plaintiff's claim was a liability within these words of exception and was thereafter by the 63rd section specially excepted from the liabilities from which the confirmation of the discharge of the debtors should absolutely free and discharge them. That section provides "that a discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander, or malicious arrest, nor for the maintenance of a parent, wife or child, or as a penalty for any offence of which the insolvent has been

convicted ; nor shall any such discharge apply without such consent to any debt due as a balance of account due by the insolvent as assignee, tutor, curator, trustee, executor or administrator under a will, or under any order of Court, or as a public officer ; nor shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done or consented to any act, matter, or thing under this Act, but the creditor of any such debt may claim and accept a dividend thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the insolvent."

I cannot read this section as specially excepting the plaintiff's claim from the liabilities existing against the defendants and provable against their estate, and from which the confirmation of their discharge absolutely freed and discharged them.

It was a privileged debt and the plaintiff was a creditor thereof, and neither it nor he could be computed in ascertaining whether a sufficient proportion of the creditors of the defendants voted upon, did, or consented to any act, matter, or thing, under the Insolvent Act ; but this had not, in my opinion, the effect of specially excepting it from the effect of the discharge.

The plaintiff could also have claimed and accepted a dividend upon it from the estate without being by reason thereof—that is, by reason of accepting such dividend—in any respect affected by the discharge ; but I do not understand that he has claimed or accepted a dividend from the estate upon it, and if he had he would not have been, by reason of so doing, in any respect affected by it, but would have remained in the same position as he was before, entitled to his privilege in respect of the balance thereof as against the estate ; but this provision has not, in my opinion, the effect of specially excepting it from the effect of the discharge.

I could only hold that the defendants were not abso-

lutely freed and discharged from all liability, in respect of the plaintiff's claim, by holding that by the Insolvent Act no debtor could be, without the consent of his creditor, freed and discharged from liability in respect of a privileged debt; but I think the scope and effect of the Act, as well as its express words, are against this.

In my opinion judgment ought to be for the defendants.

Judgment for the plaintiff.

JONES V. GRAND TRUNK R. W. CO.

Railway Co.—Negligence—Nonsuit.

Plaintiff, while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal, which had been placed on the track. The only evidence given was, that certain servants of defendants had these fog signals in their possession for lawful purposes, but that no one to the knowledge of several of the defendants' employees, who were called as witnesses for the plaintiff, placed this one on the track, and that it was wholly unnecessary for defendants' purposes; and it appeared not impossible that it might have been obtained from defendants' servants by some third party, or might have been put there by a servant of defendants for a frolic.

Held, that a nonsuit was properly directed.

THE declaration stated that the plaintiff was lawfully on the platform facing the railway at defendants' Belleville station, and the defendants, by their servants, wrongfully and negligently put and placed on the railway a certain explosive thing called a fog signal or other explosive, and wrongfully and negligently kept and continued the same there until the arrival of the train, by contact whereof the said fog signal exploded and burst, and the splinters injured plaintiff's eye, of which he thereby lost the sight.

Plea: Not guilty.

At the trial, at the last Spring Assizes at Belleville, before Osler, J., and a jury, it appeared that the plaintiff was standing on the platform, awaiting the arrival of the train, about noon on the 1st of July: that it was a clear day, and there was no fog: that as the locomotive passed it exploded a fog signal on the track, injuring plaintiff's eye, and that the report of another fog signal was also heard.

It was proved that there was no necessity whatever for the use of such signals at that time, and that no servant of the company would have thought it necessary to use them then for the purposes of the company; and a witness for the plaintiff said that no person could have put them there for any purpose of the company.

The plaintiff called the station master and three other of the company's servants.

The former stated that the men were supplied with these fog signals, and when they were out of them they applied for more and he supplied them: that he did not give them to strangers, but that the men actively engaged on the road constantly had them in their possession. He said there was no special appointment of men to keep the track clear beyond seeing that it was not encumbered with engines or cars when a train was coming. It was shewn that these signals were not articles ordinarily for sale: that the company got them from Montreal from their store department. This witness considered they must have been put on the track by some one for a frolic. He said all railways used them: that he thought the contractors on the Grand Junction Railway must have them, as they ran by night: that their fireman and driver were supplied by defendants with them: that they were kept at the store house under lock and key before they were supplied to the people, except a few which he kept in his office to be readily got hold of in case he wanted to use them himself particularly. One of the Grand Trunk men said he saw the signal on the track just as the train came in, but he could not try to remove it except at the risk of his life. They all swore they had not put it there, and knew nothing whatever about it.

At the end of the plaintiff's case the learned Judge held that he could see no evidence from which the jury could reasonably infer that any servant of the defendants had put them on the track, all that was shewn being that certain servants of the defendants had them in their possession for lawful purposes; and they might have been obtained from them by some third party, or might have been put there by a servant for a frolic, and not for any purpose of the company or their business: that in either view the plaintiff must fail; and he directed a nonsuit.

May 19, 1880. *Wallbridge*, Q.C. obtained a rule *nisi* to set aside the nonsuit, on the grounds (1) that the plaintiff had proved the wrongful act complained of, and it was cast on the defendants to excuse themselves; (2) that negligence was shewn, and it was on defendants to shew that the act was done by a stranger, or without their authority, and not in the course of defendants' employment; (3) that there was negligence in not keeping the road free from the fog signals shewn to have been there, and likely to cause the injury complained of.

May 26, 1880. *Bethune*, Q.C., shewed cause. If the fog signal had been there so long that the defendants ought reasonably to have been aware of it, they might have been guilty of negligence. The charge is, that the defendants put it there; but there is no evidence of this. Whoever did it did it tortiously, and therefore the company are not liable.

Wallbridge, Q.C., contra. Plaintiff was lawfully on the platform, which was provided for persons to stand upon, neither too near nor too remote, and there was nothing to shew contributory negligence on his part. If he was lawfully there, the onus was on defendants to shew how the explosive was put there. If defendants furnish these signals to their men, to be used according to their own judgment, they must be responsible for the manner in which they may be used; and they must shew, if they want to escape liability, that the signals were not there by

their authority. He cited *Ayles v. South Eastern R. W. Co.*, L. R. 3 Ex. 146; *Christie v. Griggs*, 2 Camp. 78; *Francis v. Cockrell*, L. R. 5 Q. B. 501.

June 26th, 1880. HAGARTY, C.J.—The accident in this case was of a very peculiar character, and no case of a similar kind has been cited. We have therefore to decide it on general principles.

There are many cases in which the very nature of the accident *primâ facie* raises the presumption of negligence; the collision of trains, a train running off the track, a stage coach breaking down, &c.; in the language of the Courts, *res ipsa loquitur*; a bale of goods falling from defendant's warehouse on a passer by: *Byrne v. Boadle*, 2 H. & C. 722; a brick falling from a railway bridge on a passenger in a passing train; a passenger going from the station being injured by falling in the dark over a hamper improperly left there by the company's servants: *Kearney v. London and Brighton R. W. Co.*, L. R. 5 Q. B. 511, and in Error 6 Q. B. 759; *Nicholson v. Lancashire and Yorkshire R. W. Co.*, 3 H. & C. 534; *Scott v. London Docks Co.*, 3 H. & C. 596. All these may be referred to on the general principle.

In *Cornman v. Eastern Counties Railway*, 4 H. & N. 781, Bramwell, B., says: "It is not enough to say that there was some evidence; a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence."

Tried by such a test as this it is difficult to say that this nonsuit was wrong. If a verdict were for the plaintiff on such evidence it may surely be said that the jury merely guessed at the possibility of the defendants' servants having been negligent in some unexplained way.

If there had been shewn to have been an obstruction, such as a log or a stone, on the track, from which plaintiff, a

passenger, had been injured, it may well be that it would be thrown on defendants to explain how it was not from their default.

The plaintiff here did not content himself with proving that by the explosion of a fog signal on the track he was injured, but he called the station master and three or four other servants of the company, who proved very distinctly that no one to their knowledge placed the signal there: that it was wholly unnecessary for the purposes of the company, and that no servant in the discharge of his duty or employment would have thought of doing so for any such purpose.

Are we to assume that the defendants were bound to give any further either affirmative evidence, that an outsider had so placed the signal, or to have called every one else who might have been in the employ of the company in or about the station (if any such there were) to negative the placing of it?

The signals are placed in the hands of certain servants of the company, for certain lawful purposes, necessary for the working of every road.

The evidence shewed that this was the first accident ever heard of from a fog signal. One man said he thinks a fragment of one on one occasion struck his coat behind him.

It may be surmised here that some one managed to get a couple of these signals from the store or from the possession of some person entrusted with them, and put them on the track for a frolic. To make defendants liable on such a surmise would be first to assume that it was a servant who did the act, and, secondly, that the defendants must be responsible, although the act was done in no way in performance of any duty or in the course of any employment.

In *Daniel v. Metropolitan R. W. Co.*, L. R. 3. C. P. 222, Willes, J., says: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with

reasonable certainty what particular precaution should have been taken," He held the company liable on the evidence. This case appears in Error in the same vol., 591, where the decision was reversed and the company succeeded.

The case was taken to the House of Lords, L. R. 5 H. L. 45, and the decision in Error confirmed. It went off ultimately on the non-liability of the company for work which was being done by contractors. Some other remarks of Willes, J., are dissented from.

The case of the *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. Cas. 197, very clearly defines the province of the Judge in actions for negligence. Lord Cairns says: "The Judge has to say whether any facts have been established from which negligence *may be* reasonably inferred: the jurors have to say whether, from those facts when submitted to them, negligence *ought to be* inferred." The judgments of the Law Lords in this important case very fully illustrate the doctrine as to proof of negligence.

Lord Blackburn says: "It is now settled that the question for the Judge, (subject of course to review,) is, as is stated by Maule, J., in *Jewell v. Parr*, 13 C. B. 916, 'not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.'" He proceeds to point out that Judges may and do differ, whether there is or is not evidence. "I quite agree that this is so, and it is an evil. But I think it is a far slighter evil than it would be to leave in the hands of the jury a power which might be exercised in the most arbitrary manner."

The plaintiff has suffered most severely, and is much to be commiserated. But I cannot see how I can hold that my brother Osler was wrong in deciding, in effect, that (in Lord Blackburn's words) there was no evidence that ought reasonably to satisfy a jury that the fact sought to be proved was established.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

IN RE MCALPINE AND THE CORPORATION OF THE
TOWNSHIP OF EUPHEMIA.

By-law dissolving a union of school sections—Petition for—Delay in moving.

On application to quash a by-law dissolving a union school section, *Held*, that the council were not bound to go behind the assessment roll to ascertain whether the petition for such dissolution was signed by a majority of the assessed freeholders and householders, as required by sec. 140 of the Public Schools Act, R. S. O., ch. 204.

The petition was, that the section might be dissolved, "when," it was added, "a new section may be formed, and a few lots from sections 2, 7 and 8, might be annexed to equalize the area with other sections."

Held, that this addition, being a mere suggestion, formed no objection. The by-law provided that the dissolution should take effect "from and after," instead of on "the 1st January, 1880:" *Held*, no objection.

The by-law was passed on the 7th April, and this motion was not made until December following: *Semble*, that this delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit.

December 16, 1879. *W. R. Mulock* obtained a rule *nisi* to quash by-law No. 108 of the corporation of the township of Euphemia, passed 7th of April, 1879, for dissolving the union of school section No. 6 of that township with school section No. 7 of the township of Brooke, on the grounds: that the council had no authority to pass the by-law, inasmuch as a dissolution of the union section had not been petitioned for by a majority of the freeholders and householders of section No. 6: that the petition, pursuant to which the by-law purported to have been passed, having coupled with the prayer for a dissolution a prayer for the formation of a new school section, the same was illegal and of no validity; and that the by-law was illegal and contrary to the statute, in providing that it was not to come into force and effect until *after* the first day of January after the passing thereof.

It appeared that for several years previous to the passing of the by-law a union school section had existed, composed of section No. 6 of Euphemia and section No. 7 of Brooke.

The by-law recited that a petition had been presented,

signed by Thomas Rickard and twenty-one others, being a majority of the assessed freeholders and householders of school section No. 6, praying that the union might be dissolved, and that a new section might be formed, composed of parts of sections Nos. 2, 7, and 8, to equalize the area with that of other school sections. The by-law then enacted, that by virtue of section 140, ch. 204, of the Revised Statutes of Ontario, the union between the said sections 6 and 7 should be dissolved, and that the dissolution should be in force from and after the first day of January, 1880.

In support of the application it was alleged that the petition upon which the council acted purported to be signed by twenty-two of the assessed freeholders and householders of school section No. 6, there being then forty-two persons assessed in the section as freeholders, householders, or tenants, or as by law entitled to vote on their incomes or as farmers' sons; but that there were in fact only thirty-eight assessed freeholders and householders or tenants in the section, and that the petition, though on its face purporting to be signed by twenty-two of the assessed freeholders and householders, was in fact signed by eighteen only, four of the persons who signed it being on the roll or voters' list as farmers' sons and for no other reason.

A paper was filed entitled, "A list of property in school section No. 6 of the township of Euphemia in union with school section No. 7 of the township of Brooke, as taken from the assessment roll of Euphemia for the year 1878. To this list was attached a certificate, which purported to be signed by William Armstrong, township clerk, under the corporate seal of the township, stating that it was a correct list *of the lands and of the amount rated* on the school section as taken from the assessment roll of 1878. The affidavit of Peter McAlpine stated that such list and certificate had been received by him from the clerk.

This list contained the names of thirty-six persons only, and did not shew how they were assessed, whether as

freeholders, tenants, farmers' sons, &c. Only eighteen of the names attached to the petition appeared on this list, and of these one, namely, Elijah Armstrong, was assessed as a farmer's son. The four names omitted were those of Robert Holmes, Jr., D. Turner, Alex. Turner, and William Armstrong.

The affidavit of James Johnston, Sr., stated that Alex. Turner, one of the signers of the petition, was not a householder on the 7th of April, 1879, and that Turner had informed him, and he verily believed, that he was not a freeholder: that James W. Johnston, another signer of the petition, was not a householder, and to the best of deponent's knowledge and belief was not a freeholder: that the deponent knew that one John Bell, who had also signed the petition, was not at that time, or for some time previous thereto, a freeholder or householder in the section; and that Robert Holmes, Jr., and Elijah Armstrong, who had also signed the petition, were on the voters' list as farmers' sons only.

On behalf of the township an affidavit in reply was filed, made by William Armstrong, the township clerk, verifying a list of the ratepayers in the school section, as taken from the revised assessment roll for the year 1878, and stating that such list was a correct copy of the roll, so far as it affected the section.

This list contained forty-three names, and included all those attached to the petition. The persons assessed were described in the proper column as owners, tenants, or farmers' sons, as the case might be. Four persons appeared thereon to be assessed as farmers' sons, viz., Elijah Armstrong, Robert Holmes, Jr., Alex'r Rickards, and D. McPhail. Of the four persons omitted from the other list, but who appeared on that filed by the township, one only, viz., Robert Holmes, Jr., was assessed as a farmer's son. The other three were assessed as freeholders or tenants.

February 27, 1880. *McMichael*, Q. C., shewed cause, before Osler, J., sitting alone, and *Kerr*, Q. C., supported the rule.

The principal question argued was whether the petition for the by-law had been signed by the requisite number of the assessed freeholders and householders of school section No. 6, it being contended on the one hand and denied on the other that the petition was sufficiently signed, and that the applicant could not go behind the assessment roll to ascertain who were in fact freeholders and householders, and could not be heard to show who were voters as farmers' sons only. It was also contended that the by-law having been passed on the 7th of April, 1879, and the motion made in December, 1879, the latter was too late.

June 8, 1880. OSLER, J.—Section 140 of the Public School Act, R. S. O., ch. 204, enacts: "The boundaries of a union school section may be altered or dissolved by the council of either municipality in which part of the union is comprised, in case the same is petitioned for by a majority of the assessed freeholders and householders of such part, * * but no dissolution shall take effect until the first day of the month of January which will be at least three months after the passing of the by-law in that behalf."

Taking the list produced by the applicant, which contains thirty-six names, the petition was signed by four persons whose names do not appear on that list, and of the remaining eighteen one is assessed as a farmer's son. The petition, therefore, would appear not to have been signed by a majority of the assessed freeholders and householders of the section, as required by the Act. If this objection was unanswered the by-law could not be supported, for the foundation of the jurisdiction of the council to pass it is, that the dissolution of the union shall be petitioned for by the majority of the assessed freeholders and householders of the part of the union comprised within such municipality.

The list, however, produced by the township, in shewing cause to the rule, contains, omitting those who are assessed as farmers' sons, the names of thirty-nine persons who are assessed as freeholders, householders, or tenants, and twenty of these thirty-nine have signed the petition.

No explanation has been offered of the discrepancy between the two lists, but the latter is the only one which is verified by affidavit.

If it be adopted, as I think it must, as the one upon which the council acted, then the petition was properly signed by the requisite majority of the assessed freeholders and householders of the section. It is said that John Bell, one of the householders who signed it, had ceased to reside in the section at the date of the petition, and that his name should not be taken into consideration. I think, however, that the council, in acting upon such a petition, cannot be required to go behind the assessment roll, and that if in good faith they pass a by-law upon a petition which appears to be duly signed by the requisite majority of freeholders and householders in the section, as appearing upon the roll, their action cannot be impeached merely because a person assessed as freeholder or householder has ceased to be a freeholder or resident of the section. The Act contains no provision by which the Council are enabled to make enquiry into the *status* of any one signing the petition, and if action was to be delayed in all cases until such *status* could be verified injustice or inconvenience might be the result. Nor can it be supposed that the Council, acting upon the information derived from the assessment roll, are to pass the by-law only at the peril of having to pay the costs of an application to quash it, should it afterwards be found upon enquiry that one or more of the persons, who appear by the roll to be good petitioners, have ceased to be freeholders or householders in the section.

On the whole, therefore, I am of opinion that the council, in acting upon such a petition, are to be guided by the assessment roll in considering whether it has been signed by the requisite majority of the freeholders and householders of the section.

The other objections to the by-law may be briefly noticed. It is said that the petition asks not only for the dissolution of the section but for the formation of new sections. The prayer is, "That the union may be dis-

solved, when a new section may be formed, and a few lots from sections 2, 7, and 8, might be annexed to equalize the area with other sections." This seems to be a mere suggestion, and nothing more.

I am unable to see any force in the objection that the by-law provides that the dissolution of the union shall take effect from and after the first day of January, 1880, instead of on the first day of that month. The section already referred to enacts that "the dissolution shall not take effect until the first day of January, which will be at least three months after the passing of the by-law." The object of this of course is to prevent the inconvenience which would result from a change during the school year. Probably it was unnecessary to have made any provision in the by-law as to the time at which the dissolution should take effect, but as the time fixed was prior to the day appointed by the statute for the annual election of trustees, I think there is nothing in the statute which compels me to hold that the by-law is bad on this ground.

It was strongly urged by Dr. McMichal that the rule should be discharged because of the great delay in making the application. The by-law was passed on the 7th of April, 1879, and very shortly afterwards another by-law was passed by the township of Euphemia re-arranging all the school sections in that township, and an award was made, as required by the 140th section of the Act, as to the terms of the dissolution of the union. The applicant knew of all the objections which he now urges against the by-law at the time it was passed, but did not move against it until the 16th of December, 1879, when it would have been too late, if the by-law had been quashed, to pass another which could take effect in January, 1880. No explanation has been offered of this delay, and although I dispose of the application on other grounds, I must say that such a delay unexplained would, in my opinion, have warranted me, under the circumstances of this case, in discharging the rule on that ground alone; for it by no means follows that because a party comes within the year

fixed by the statute as the extreme limit, he is therefore absolved from any charge of *laches*.

I have not overlooked the facts which the applicant has put forward to shew that the by-law will operate harshly upon him and some others affected by it. This, however, was a matter entirely for the council to consider, and I cannot accept the argument that the hardship of the case is an excuse for delay; indeed, I should have supposed that it would have been a stimulus to exertion.

I think the rule should be discharged, with costs.

Rule discharged, with costs.

MARTIN V. BEARMAN.

Chattel mortgage—Chose in action—Assignment of—Liability of assignee.

The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor. These goods were so taken, and defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in this action, alleging that H., the mortgagee, verbally agreed to pay these executions, which were made part of the money secured.

Held, that the defendant, as assignee, took subject to such agreement, (which did not vary the terms of the mortgage,) though without notice of it; and that the plaintiff therefore was improperly nonsuited.

THE declaration contained three counts: 1st. Trover for converting the stock of the plaintiff as a marble cutter. 2nd. Trespass, in seizing and taking the said stock; and, 3rd, setting out that the plaintiff gave a chattel mortgage, dated 21st June, A.D. 1879, to one Hancock, to secure certain moneys and promissory notes, with a proviso for redemption upon payment; and Hancock, before taking possession of the goods, assigned the said chattel mortgage

to the defendant, who took possession, and *before default* by the plaintiff sold the goods, whereby, &c.

Pleas: 1. Not guilty.

2. Goods not the property of the plaintiff.

3. Leave and license; and,

4. To the first and second counts, setting out the same facts as in the third count, with the averment that it was agreed by said mortgage that if the goods should be seized or taken in execution by any creditor of plaintiff, Hancock, his executors, administrators, or assigns, was to sell the goods, alleging such a seizure and a sale in consequence by defendant.

Issue, with special replication to the fourth and fifth pleas, that the seizure under execution was prior to the chattel mortgage, and Hancock took the mortgage with notice of the same, and the amounts of the executions were deducted from the moneys agreed by the said Hancock to be advanced upon the security of said mortgage, and were retained by him, and agreed by him to be applied in payment of the same, and were included in the sum sworn to be advanced upon said mortgage; and before the execution of said mortgage said executions were assumed by said Hancock, and, as between the plaintiff and him, became and were the debts of Hancock, and save as aforesaid the goods never were seized by any creditor of the plaintiff.

Rejoinder, by defendant taking issue on the replication, with a further special rejoinder, that the supposed contract between the plaintiff and Hancock was not in writing, and there was not any memorandum in writing whatsoever concerning the same signed by the said Hancock or his agent, and defendant had no notice of the said verbal contract when he took the assignment of the mortgage.

There was a further special rejoinder to said replication, that the 4th and 5th pleas were pleaded and defendant was defending, not in respect of or as to the seizure and taking in execution of the goods therein mentioned, but as to another seizure and taking in execution of such

goods after the making of the chattel mortgage in said replication mentioned.

The plaintiff took issue upon the said third rejoinder, and demurred to the second special rejoinder on the following grounds: 1. That it confessed without avoiding the matters set forth in the said replication. 2. That taking the mortgage without notice of the agreement was no answer to the said matters. 3. The defendant was a mere assignee of a chose in action, with no greater rights than the mortgagee. 4. That the agreement set forth, though verbal, being made before the execution of the mortgage, was good, and not inconsistent with the terms of the mortgage.

The defendant also gave notice of exception to the sufficiency of the said third count on the following grounds: That the said count did not shew that the mortgage contained any provision for a tenancy or right of possession by the plaintiff of or in the goods, but, on the contrary, the goods appeared to have been absolutely conveyed by the chattel mortgage to Hancock, subject only to a condition enabling the plaintiff to redeem.

Before the trial the demurrer and exceptions were heard before Osler, J., and judgment thereon given in favour of the plaintiff.

At the trial the chattel mortgage was put in. It bore date the 21st day of June, 1879, and contained no direct provision for the mortgagor remaining in possession of the goods. It contained a recital that Hancock, the mortgagee, had become surety for the plaintiff for the due payment, within one year from the dates thereof respectively, of certain promissory notes given by the plaintiff to certain of his creditors, in satisfaction of their claims against him, by endorsing the said notes, which were as follows: Note, dated 27th February, 1879, for \$238.71, made by plaintiff, payable to the order of Hancock one year after date, and endorsed by him to Messrs. Rice & Waters. 2nd. Note, dated 25th March, 1879, for \$70, made by the plaintiff to the order of Hancock, and endorsed by him, to Messrs.

McArthur & Middleton, payable six months after date ; and that at the request of Hancock, and for the purpose of securing him against said liabilities, as also the payment of \$470 due and owing from the plaintiff to him, the plaintiff agreed to execute the chattel mortgage. The proviso for redemption was, that if the plaintiff paid the sum of \$470 within a year, as also the promissory notes made by him and endorsed by Hancock, with any renewal or renewals, * * the mortgage was to be void.

Plaintiff covenanted to pay according to the proviso, "and that if default should be made in payment, * * or if he should improperly or fraudulently attempt to sell or dispose of or part with the possession of the goods, or to remove the same from the county of Wentworth, without the consent of Hancock, his executors, administrators, or assigns ; or in case he permitted the goods to be misused, abused, or wilfully suffered the same, or any part thereof, to depreciate in value, or if the goods should be seized or taken in execution or in attachment by any creditor of his, then Hancock, his, &c., was to take possession, sell the goods and repay himself, and return any surplus to plaintiff.

There was a further clause that any goods substituted for those in the mortgage were to be subject to the terms of the mortgage.

It also appeared that a Division Court execution against plaintiff's goods was issued, at the suit of one Dallas, on the 28th of May, 1879, which was renewed twice, and that a second execution was, on the 9th of June, 1879, issued out of the same Court at the suit of other parties. On the 25th of June, 1879, a third execution issued out of the same Court against plaintiff, at the suit of one Hogan. There appeared to be no renewal of this writ, and it was, on the 19th of August, 1879, returned *nulla bona*. The two other executions were on the same day returned money made out of the plaintiff. It also appeared that the bailiff was, by warrant endorsed on the chattel mortgage, dated 7th of August, 1879, authorized to seize

and take possession of the goods by the defendant, on the ground that the same had been seized in execution, and to make the sum of \$470. The bailiff swore that he made a formal seizure under the first and second executions above mentioned on the 13th of June, which he noted on the writs; that he did not make any seizure under the third writ (Hogan's), and did not note any seizure thereon after the seizure. Plaintiff asked for time, and Dallas gave him (the bailiff) a line to keep the execution renewed, and the whole thing was left in his hands. On the 7th of August a man was put in possession under the writs, and after putting the man in possession the bailiff got the authority from defendant to seize under the mortgage. The bailiff also swore that Hancock wanted to know the amount of the executions, which witness gave him, and Hancock wanted him to take him (Hancock) for them. The notice of sale referred to two chattel mortgages, and *two*, not three executions. The other mortgage was on property not in question in this suit.

The plaintiff swore that Hancock was to pay the executions, and was to get the chattel mortgage: that he was to pay the notes in the bank, and the balance was what he (plaintiff) owed him: that Hancock said the reason he did not pay the executions was, he could not get a discount in the bank. There was evidence as to the value of the goods and conversations with defendant about the seizure.

The defendant called no witnesses, and the learned Judge nonsuited the plaintiff, on the ground that the defendant, as assignee of the chattel mortgage, without notice of the agreement between Hancock and plaintiff, was not liable.

May 17, 1880. *Osler*, Q.C., obtained a rule to shew cause why the nonsuit should not be set aside, on the ground that the assignee of the mortgage was in no better position than the mortgagee himself; and as it appeared that Hancock had agreed to pay off the executions existing at the time the chattel mortgage was executed, and the amount thereof was included in the sum payable by the plaintiff to the

mortgagee, the subsequent seizure under these executions would not justify defendant in taking possession of the goods under the provision in the mortgage in that behalf; and whether trover or trespass could be maintained or not, by reason of there being no direct provision that the plaintiff should retain possession of the goods until default in payment or other default provided against, the third count was maintainable.

May 27, 1880. *R. Martin*, shewed cause. Plaintiff was correctly nonsuited on the ground taken at the trial; but if not it is open to defendant to uphold the nonsuit on any other sufficient ground; and clearly the defendant was justified as to all he did by the newly assigned execution. On the pleadings the onus was on the plaintiff to shew a legal cause of action as owner or possessor of the goods, which the evidence failed to do. Plaintiff's was not an equitable purely money demand which a law court, however the pleadings might be amended to correspond with the evidence, had by statute jurisdiction to try. Until plaintiff redeemed the mortgage, and for the want of a redemise clause in the mortgage, he had no right to the goods themselves, and could not bring any action as to them, as is shewn by *Mauham v. Sharpe*, 17 C. B. N. S. 443; and even if he could, which he could not as to the third count, yet *Hollis v. Marshall*, 2 H. & N. 755, 764-5, shews that count bad, and no cause of action stated in it to support the false deduction of law therein contained as to the facts there alleged, for a mere sale would not destroy the equity of redemption. He also cited *Pilcher v. Rawlins*, L. R. 7 Chy. App. 259; *Aldborough v. Trye*, 7 C. & F. 436, 463; *Re Blakely Ordnance Co.*, L. R. 3 Chy. App. 154; *Credlead v. Potter*, L. R. 10 Chy. App. 8, 12; *Judd v. Green*, 33 L. T. N. S. 597; *Mason v. Scott*, 22 Gr. 592.

Osler, Q.C., contra. The plaintiff can recover on all the counts. As to the first two counts, there is an implied right of possession in the mortgagor notwithstanding the absence of a redemise clause: See *National, &c., Bank v. Hamp-*

son, L. R. 5 Q. B. D., 177, but in any event the plaintiff can recover, upon the third count, which is framed on the decision in *Bingham v. Bettinson*, 30 C. P. 438. The defendant seeks to justify under the covenant in the mortgage, giving the right to realize in case of seizure of the goods under execution. As the mortgagee could not rely on this covenant, as he had agreed to pay off the execution under which the seizure had been made prior to the execution of the mortgage, his assignee can be in no better position: *Matthews v. Wallwyn*, 4 Ves. 118; further, the seizure relied upon taking place before the covenant was entered into cannot be relied on as a breach: *Shaw v. Kidd*, 1 Ex. 412.

June 26th, 1880. CAMERON, J.—The correctness of the nonsuit depends entirely upon the question whether the defendant, as assignee, without notice of the alleged agreement between the mortgagor, the plaintiff, and the defendants' assignor, Hancock, by which the latter was to pay off the executions in the bailiff's hands at the time the mortgage was executed, is affected thereby as an equity attaching to the mortgage. If bound, then it became a question of fact whether there had been a seizure or not under the third, or Hogan's, execution, which ought to have been submitted to the jury.

The case of *Bingham v. Bettinson*, 30 C. P., 438, is an express authority that an action will lie against a mortgagee of chattels under a mortgage not containing a provision that the mortgagor should retain possession of the mortgaged goods until default, where the goods have been sold by the mortgagee before default in payment or in the performance of covenants, and is binding upon us. Then, as to the assignee's position. The general principle is, that the assignee of a chose in action takes it subject to the equities existing between the original parties to the contract. Lord Cairns, *In re Agra and Masterman's Bank*, L. R. 2 Ch. App. 397, says: "Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the

original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities." A chose in action is now assignable at law under the Act, R. S. O. ch. 116, but subject to the equities existing before notice of the assignment.

The debt created by the chattel mortgage is the principal object of the mortgage, the goods mortgaged being merely a security for the debt, the holder thereof is entitled to control the goods, no matter in whose hands, for the satisfaction of the debt. A chattel mortgage is then, in effect, a chose in action, subject to the incidents thereof, and any matter open to inquiry between the original parties affecting their rights thereunder may be questioned in any proceeding by or against the assignee.

In *Matthews v. Wallwyn*, 4 Ves. 118, it was held that a mortgagor of real estate could shew, as against the assignee, the true transaction and state of account between him and the mortgagor; and this principle has been fully recognized and followed in our own Courts, as shewn by the authorities referred to on the argument.

In the case of *Egleson v. Howe*, 3 App. R. 574, Moss, C. J., refers to it in this way: "The defendant's contention was mainly rested upon two well settled principles: the first is, that a purchaser is entitled to apply unpaid purchase money (even if secured), in the discharge of incumbrances which are within the vendor's covenants; and the other is, that an assignee of a mortgage takes it subject to equities subsisting between the mortgagor and mortgagee, *at least in relation to the amount payable upon the security.*"

Mr. Martin contended that the right of questioning the mortgage and shewing the position of the parties was limited solely to the state of the account, and did not extend to any other matter. This is narrowing the right of the mortgagor beyond what the authorities warrant. It is conceded the mortgagor might shew that the amount of debt was not as represented by the mortgagee, either by

showing that that amount had never been advanced or that it had been reduced by payments made before notice of the assignment to the mortgagee. Thus, in the present case, it could be shewn that the debt should be reduced by the amount of the two executions on which the seizure of the mortgaged goods was made, because the mortgagee had agreed to pay these executions and had failed to do so : that they formed, in fact, part of the alleged debt ; and yet it was not permissible to shew the same fact as a reason why the plaintiff's goods were wrongfully taken by the defendant. It appears to me there is no foundation for this contention. As between the mortgagor, the plaintiff, and Hancock, the mortgagee, it would be impossible to hold that he could set up a seizure under these executions, caused by his failure to pay them in accordance with his agreement, as a justification for taking the plaintiff's goods before default had been made in payment of the money secured by the mortgage ; in other words, by his own wrong hasten the time of payment of his debt ; and I cannot see upon what principle his assignee, the defendant, should be in a better position to avail himself of that wrong. It was contended that, as between the plaintiff and Hancock, the plaintiff could not shew Hancock's agreement, as it would be varying by parol evidence the terms of a sealed instrument. It has not that effect. It simply shews the circumstances under which the mortgage was executed, and by them the executions, as between the plaintiff and Hancock, ceased to be executions of the creditors of plaintiff to which the terms of the mortgage could have any reference.

I think, therefore, the nonsuit should be set aside and a new trial had between the parties.

HAGARTY, C.J.—I agree there must be a new trial to ascertain the doubtful fact as to the third execution.

On the legal question, argued with such force and industry by Mr. R. Martin, I am of opinion that it is an admitted principle that an assignee takes an assignment of

a mortgage, subject to the state of the account between the original parties : that if the stated mortgage debt be, say, \$500, and \$400 thereof is made up of the amount of two executions or claims of third persons against the mortgagor, and which are made part of the debt on the express agreement that the mortgagee shall discharge them, that the failure of the latter so to do at once affects the amount of the mortgage debt, and must be a matter to be enquired into between the mortgagor and assignee, with or without notice to the latter.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

Rule absolute for new trial.

AGRICULTURAL INVESTMENT CO. v. THE FEDERAL BANK.

Payment by bank on forged indorsement of cheques—Right of the drawer to recover back.

The plaintiffs, a money loaning company, were imposed upon by one S., who in July, 1877, forged the name of B. to an application for a loan of \$2,000, to a mortgage on B.'s land, to correspondence with the plaintiffs, and to the endorsement of the cheques, given in August and September by the plaintiffs on defendants, their bankers, for the money borrowed.

H., the plaintiffs' valuator, certified that he had inspected the property, and placed his name as a witness to the signature of B. to the application, but he never saw the property or the signature, and acted solely on what S. told him. S., in June and July, 1878, sent money to the plaintiffs for the first annual instalment, and the plaintiffs never discovered the fraud until July, 1879. The cheques had been presented to defendants through other banks, and paid in good faith, and had been sent to the plaintiffs in the following month, with other vouchers, and with their book, in which the balance had been made up each month, as is usual.

Held, that the plaintiffs were entitled to recover from defendants the amounts so paid by defendants on the forged endorsements, and charged to the plaintiffs: that the negligence of plaintiffs' valuator formed no defence, for it was in no way the cause of defendants paying the cheques: that the acceptance of the cheques in the monthly account was no bar, being made under a mistake of fact; and that defendants could not claim to be allowed in reduction the moneys remitted by S. on the forged mortgage.

DECLARATION on the common money counts.

Pleas, never indebted, and payment.

Plaintiffs were a loan society at London, and kept their bank account with defendants.

One Hughes was a valuator and agent for the plaintiffs at Dresden, and one Stobbs came to him in July, 1877, stating that his brother-in-law, named Bee, wanted a loan of \$2,000. Hughes gave him a printed form of application, he filling the blanks on Stobbs's statements, and gave it to him to have signed. Stobbs returned it to him with the names "John T. Bee and Isaac Bee, P. O. Wheatly," apparently signed as applicants for the loan, to be secured on south-west and south-east quarters (100 acres,) of lot 15, in the 2nd concession of Romney. The loan "to be remitted to me by cheque, addressed to Alfred Hughes of Dresden. P. O., and this will be your authority for doing so at my risk. Witness, Alfred Hughes, Valuator."

Hughes certified that he had personally inspected the property, and that his report contained a correct description: that the value was \$4,600, and that a brick house was being built. Hughes in fact never saw the property, and did not see the signatures, though he placed his name as witness.

He acted solely on what Stobbs told him, believing all he said to be correct.

The two Bees knew nothing whatever of the matter; they never applied for the loan, and their names were forged to the application by Stobbs.

Hughes sent the application to the plaintiffs at London, who agreed to make the loan, and their solicitor proceeded to examine the title, which was approved.

There further appeared a mortgage, dated the 24th of July, 1877, executed by Isaac Bee and John T. Bee, to the Society, for \$2000, to be void on payment of \$3,144 in ten annual instalments of \$314.40. This was witnessed by Thomas R. Stobbs, and an affidavit made by him to the due execution.

The plaintiffs sent the mortgage to Hughes, who sent it to Stobbs, then living in Chatham, and Stobbs sent it direct to the plaintiffs' solicitor, apparently well executed.

The solicitor certified to the plaintiffs that he had investigated the title and found it good, and that I. and J. Bee, had executed a mortgage, and they were to effect an insurance on the building.

The mortgage was registered 2nd August, 1877.

On the 21st of August, 1877, the plaintiffs' manager, M. Roe, wrote a letter, addressed to Mr. Isaac Bee, Chatham, stating that his telegram had been received, and enclosing a cheque of \$500 on defendants' bank, and sending his application paper for insurance on the buildings, which the plaintiffs effected.

The telegram had been sent by Stobbs, who obtained the cheque so sent.

It was payable to Isaac Bee and John T. Bee, or order, "*Re* loan on mortgage." These cheques were headed payable, without discount, at any branch of defendants' bank. It was endorsed Isaac Bee, John T. Bee, Thomas R. Stobbs.

On the 27th August, 1877, a cheque for \$300, payable in like manner to Bee's order, was sent in a letter addressed as above.

Stobbs then sent certificates that the brick house was nearly finished; and the plaintiffs, on September 5th, 1877, sent a third cheque for \$1,173.20, which, deducting the amount paid for insurance, made up the \$2,900. This was payable like the first.

All three cheques professed to be endorsed by the two Bees and by Stobbs, who obtained the money on each, not from defendants' bank direct, but from the Merchants' Bank and Bank of Commerce, through whom they were received and paid by defendants' bank.

Stobbs corresponded with the plaintiffs under the name of Isaac Bee, and acknowledged receipt of the cheques.

On June 19, 1878, Stobbs sent \$100 to the plaintiffs in Bee's name, in part payment of the annual instalment, and directing them to communicate through T. R. Stobbs, Leamington, where he then resided.

On the 23rd July, 1878, Stobbs sent in his own name \$100, and on September 21, 1877, \$118 for the first annual

instalment. The first intimation plaintiffs had of anything being wrong was by letter 17th June, 1879, from the solicitors of the Bees, who had discovered that such a mortgage had been placed on record, and that it was a forgery, and they suspected Stobbs as the culprit.

The plaintiffs' manager proceeded to Chatham, and had a warrant issued for Stobbs, who was arrested, committed for trial, obtained bail, and absconded shortly before the Assizes. Defendants were at once informed of what had occurred.

These cheques were paid by defendants in good faith, and in the usual course of business were handed by defendants to plaintiffs, with other vouchers, in the commencement of the month following the receipt of the same at the bank.

The bank book of the plaintiffs was put in, shewing the balances at the end of each month; and this went on for many months till the discovery of this fraud and forgery.

The case was tried at London, before Wilson, C. J., who entered a verdict for the defendants, leaving all to the Court.

There was no doubt whatever of the forgery. The Bees never authorized, or recognized, or derived any benefit from the transactions, which from beginning to end seemed a well managed fraud on the part of Stobbs, who forged their names to the applications, the mortgage, the letters, and the endorsements of the cheques.

The plaintiffs requested defendants to credit them with the amounts of these three cheques, but defendants refused.

May 18, 1880. *Bayly* obtained a rule to enter a verdict for the plaintiffs.

May 26, 1880. *J. K. Kerr*, Q. C., shewed cause. The forgeries not having been discovered until after the lapse of over one and a half years, was evidence of laches on the plaintiffs' part disentitling them to recover. The company was guilty of negligence in accepting the loan for which the cheques were given, as the evidence shewed that

Hughes, the plaintiffs' valuator, who procured the loan, did not inspect the property, and if he had done so the fraud practised by Stobbs would probably have been discovered, and so the cheques would not have been issued. There were regular monthly settlements between plaintiffs and defendants, as their bankers, in which the plaintiffs acknowledged the correctness of the account after the cheques had been charged and returned to them. He cited *Bigelow* on Estoppel, p. 405, and referred to the cases there collected; *Orr v. Union Bank of Scotland*, 1 McQ. H. L. 522; *Ogden v. Benas*, L. R. 9 C. P. 513; *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525; *Lickbarrow v. Mason*, 2 T. R. 70.

Bayly contra. The law applicable to the present case is laid down in *Robarts v. Tucker*, 16 Q. B. 560. The circumstances of the present case are stronger in the plaintiffs' favour than those in *Robarts v. Tucker*, as in the latter the forged indorsements were actually upon the draft when it was accepted, and the words, "or order," were at the instance of the forger himself added to the draft, which was then handed to him. There was no laches on the plaintiffs' part here, as they notified the defendants of the forgeries, and they looked to them for payment as soon as they were discovered, and Wilson, C. J., who tried the cause, so held. There was no negligence on the plaintiffs' part in the transaction at all, the only alleged negligence being on the part of Hughes, the valuator, in not inspecting the property, and this, if negligence on the plaintiff's part, is not such as directly caused the payment of the money on the forged indorsements, and so under the authorities would be no defence. See *Arnold v. The Cheque Bank*, L. R. 1 C. P. D. 578, and the cases there collected. See also *Morse on Banking*, 305, 310. As to the alleged monthly settlement of accounts, this would only throw the onus on the plaintiffs to prove error from any cause, and is no defence where forgery is established. The plaintiffs claim a verdict for the amount of the cheque and interest, provided of course that the sum does not exceed the amount remaining due on the Bee mortgage, if

the latter were not a forgery; and they claim that the money paid by Stobbs as and for the first instalment on said mortgage should not be deducted therefrom, or credited as paid by the defendants.

June 26, 1880. HAGARTY, C. J.—It was urged by defendants that the plaintiffs by their negligent manner of dealing, and the gross carelessness of their agent Hughes, had enabled Stobbs to commit this fraud, and that they were thereby disentitled to recover; and further, that they had accepted their cheques when returned to them as genuine vouchers, on the part of the defendants' bank, for payments made for them by the latter.

As to any alleged carelessness by Hughes or the plaintiffs it is difficult to understand how that can avail defendants. We cannot see how that had any thing to do with defendants' acceptance of the Bees' endorsements as genuine. As a matter of fact, the defendants received the cheques, not from Stobbs or any person carelessly or wrongfully entrusted by plaintiffs with their custody, but from other banks in the ordinary course of business.

It was just the same as if the genuine payee and holder of a cheque lost it, or had it stolen from him, and his endorsement was forged by the finder or the thief.

The subject is well discussed in *Arnold v. The Cheque Bank*, L. R. 1 C. P. Div. 587. The Court say that the correct rule is laid down by Blackburn, J., in *Swan v. North British Australasian Company*, 2 H. & C. 182. "The neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake, and also, as I think, it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

Reference is also made to *Bank of Ireland v. Evans's*

Charities, 5 H. L. C. 389, where it is asked "If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and any servant or a stranger should take it up, it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment."

The much discussed case of *Young v. Grote*, 4 Bing. 253, is referred to. There the drawer of the cheque misled the banker by want of proper caution in the mode of drawing, which admitted of easy interpolation, and consequently the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment. So Parke, B., describes the decision in *Young v. Grote*, as quoted in *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 533. In the latter case *Young v. Grote* seems doubted.

Robarts v. Tucker, 16 Q. B. 560, is also a strong case against defendants.

Orr v. Union Bank of Scotland, 1 McQueen H. L. 522, may be referred to.

I cannot see that the return of the cheques each month, and the acceptance of them as vouchers for payment, can bar the plaintiffs' claim. We all understand the course of these monthly *quasi* settlements between bank and customer.

Each party acts under a mistake of facts, viz., the assumption of a genuine endorsement by the payees of the cheques.

When the forgery is discovered the customer cannot be declared to be deprived of his claim simply on account of these monthly settlements. He discovers that it is not true that the bank has paid money on his order as is claimed in their account. He may (as is often the case,) be wholly ignorant of the handwriting of the payee, and may never have seen him.

No doubt the practice of drawing cheques to order of another throws a risk on the bank of verifying the authenticity of the endorsement. In England the Legislature

has interfered and relieved them from this responsibility in most cases—(16 & 17 Vic. ch. 50, sec. 19.)

The case of *Ogden v. Benas*, L. R. 9 C. P. 513, shews that the Courts apply this protection strictly to the banker on whom the cheque is drawn, and do not extend it to protect any other person who takes it on the faith of the forged indorsement.

It is a rare occurrence in this country—so far as the Courts understand it—that banks have suffered by forged endorsements.

The law as to recovering back money paid under mistake of facts may be seen in the authorities cited in the notes to the leading case of *Marriot v. Hampton*, 2 Sm. L. C. p. 383, Ed. 1867. At page 385 it is shewn that an allowance in account is equivalent for this purpose to the payment of money.

Mr. Kerr, for defendants, urges that they should at all events be allowed in reduction the moneys remitted by Stobbs to the plaintiffs on the forged mortgage.

We should gladly see our way to this.

The whole affair was a fraud, and no real loan or mortgage security, was effected or created. But it does not seem easy to connect these payments, made by Stobbs to keep up for a time the semblance of reality and to retard the discovery of the fraud, with this claim of defendants.

Can the bankers allege that they can claim credit for any moneys paid out of the plaintiffs' moneys in their hands for which they can produce no valid voucher?

It would be intelligible if the bank came forward and offered to place the plaintiffs in the same position as if the loan had been actually made on good security, taking the bargain supposed to be made with the Bees on their hands, and then claiming the benefit of any payments made apparently on that bargain.

But I fear we cannot do otherwise than declare that the plaintiffs are entitled to recover back the moneys so improperly charged against them in account with their

bankers, just as if the cheques in question had never been presented or paid.

Under the circumstances we allow no interest.

ARMOUR AND CAMERON, JJ., concurred.

Rule absolute.

MILLER V. GRAND TRUNK RAILWAY CO.

Railway companies—R. S. O., ch. 199.

Held, that the defendants, a railway company, were not subject to the provisions of "The Ditches and Water Courses Act," R. S. O. ch. 199.

DECLARATION: that the plaintiff and defendants were owners of adjoining lands, which would be benefited by a ditch or drain for taking off the surplus water from swamps, &c., in order to enable the owners to cultivate the same, within the meaning of R. S. O., ch. 199, and it was plaintiff's and defendants' duty to open and make said ditches and drains under said statute; and a dispute having arisen between them as to the proportion to be made by them respectively, the plaintiff, under said statute, notified defendants as to causing the fence-viewers to arbitrate: averment, that all necessary steps were taken, &c., &c., and the fence viewers awarded that certain ditches should be made and maintained by defendants: breach, that defendants did not perform the work and plaintiff did the same, alleging plaintiff's claim to be paid the value thereof by defendants, who had not paid the same.

Pleas. 1. That the lands in the declaration mentioned, and owned and occupied by defendants, were those taken by them under the statutes for their railway, and used as such, and were not subject to the said Act in the declaration mentioned.

2. Denial of notice of the award before action.

Demurrer. 1. That the first plea confesses, but does not avoid the matter alleged in the declaration. 2. The Act contains no exception in favour of railway companies. That the third plea is neither a traverse of the declaration, nor in confession or avoidance.

The statute does not render necessary notice of the award before action.

May 31, 1880. *Bethune*, Q.C., for defendants. The Ontario Legislature had no power to make such an Act as this apply to the defendants, which would interfere with the Dominion public works very seriously. R. S. O., ch. 199, sec. 2, shews that it is not intended to apply to a large corporation like a railway company, and the various sections and schedules shew that it is intended to apply only to adjoining farmers: *Mortimer v. South Wales R. W. Co.*, 1 E. & E. 375; *Knapp v. Great Western R. W. Co.*, 6 C. P. 187.

H. J. Scott, contra. A railway company is bound by assessment, and this is merely a local assessment: *Thorp v. Rutland R. W. Co.*, 27 Ver. 142. If liable, it would be for any purpose for which the Ontario Legislature could tax them, *e. g.* ditches.

As to the notice of the award, see Russ. on Awards. 2nd ed., 513.

June 26, 1880. HAGARTY, C. J.—The sole question presented for our decision on this demurrer is, whether the defendants are subject to the provisions of ch. 199 of R. S. O., called “The Ditches and Water Courses Act.”

It begins by declaring: “This Act shall not affect the Acts relating to Municipal Institutions, or the Acts respecting drainage, *as this Act is intended to apply to individual and not to public or local interests, rights or liabilities.*”

Section 3. “In case of owners occupying adjoining lands which would be benefited by making a ditch or drain, or by widening or deepening a ditch or drain already made in a natural watercourse, or by making, &c., a ditch or drain

for the purpose of taking off surplus water from swamps or low land, *in order to enable the owners or occupiers thereof to cultivate the same*, such several owners shall open and make, deepen, or widen a just and fair proportion of such ditch, &c., *according to their several interests* in the construction of the same, and such ditches, &c., shall be kept and maintained, &c., by the said owners respectively, and their successors in such ownership," &c.

By section 4 each owner may notify the other owner as to calling in the fence viewers.

By section 6, notice may be served at the owner's or occupant's last place of abode, or in case of non-residence, with any agent of the owner.

By section 7, sub-section 2, the fence-viewers shall regard the nature of the ditches in use in the locality, and the suitableness of the ditch, &c., or drain to the wants of the parties.

Sub-section 4. "If it appears to the fence viewers that the owner or occupier of any tract of land is not sufficiently interested in the opening up of the ditch, &c., to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that such ditch should be continued across such tract, they may award the same to be done at the expense of such other party; and after such award the last mentioned party may open the ditch or water-course across the tract at his own expense, without being a trespasser."

Section 9 makes the award a lien and charge on the lands respecting which it is made, when registered, &c., &c.

Section 10 allows the persons desiring to enforce the award to do the work and recover its value and the costs from the owner by action in any Division Court having jurisdiction in the locality.

Section 13. "In case any municipal corporation would be benefited by the construction of such ditch or drain, such corporation shall be in the same position as an individual owner under this Act."

I cannot bring myself to believe that a railway corpora-

tion like the defendants can be brought within the scope of this Act.

The whole design of the Act seems to be to provide for the case of individual owners; in its own words, "to enable the owners to cultivate the same."

The statute, in section 2, declares it limited to *individual* and not to public or local interests, rights, or liabilities.

The Grand Trunk Railway is not a Provincial but a Dominion work, extending through Quebec and Ontario, and the bringing it under the very peculiar powers of this Ontario Act would certainly seem to come within the exception in favour of a public interest, right, or liability.

A tract of land merely sufficiently broad to enclose with necessary fences a line of railroad, sometimes on the level, sometimes on a raised embankment, sometimes through an excavation or cutting, does not seem in any way to answer the species of property described in section 3.

The plaintiff's land, in this case, adjoins the railway track. Can we conceive the plaintiff and the company as falling within the definition of "owners occupying adjoining lands which would be benefited by making a ditch or drain," or by deepening a water-course, &c., to enable the owners to cultivate the same?"

The law protected landowners whose property was injured, or the drainage of their property stopped by the works of a railway. For the proper drainage of their road the railways may be trusted to take care of themselves. They have little, if any, interest in common with adjoining proprietors for the purposes of this exceptional legislation.

Sub-sec. 5 of section 7 no doubt contemplates the case in which one owner may not be benefited, and the drainage would be wholly on account of the other. Then, the latter is allowed to open a ditch or water-course across the land of the other at his own cost. This, in the case of railways, would be a dangerous and mischievous exercise of right, and could hardly have been in the contemplation of the Legislature.

Then, section 13 specially meets the case of a municipal

corporation. When that corporation would be benefited by the construction of the ditch or drain, they shall be in the position of an individual under the Act.

But no provision is made for the municipal corporation being made a convenience for an individual who might claim the benefit of section 7, sub-section 5, already cited.

It is a strong illustration of the well-known maxim, "*Expressio unius est exclusio alterius*."

This especial kind of corporation is to have the benefit of the Act, but only when it may be benefited by the provisions of the Act. The plaintiff here seeks to apply it to a wholly different corporation, where the benefit sought may be wholly for the adjoining proprietor.

On the whole, I think the defendants do not come within the statute.

ARMOUR, J.—I have also come to the conclusion that the Act, R. S. O., c. 199, applies only to individuals, and not to corporations, except as provided by the 13th section.

I see no reason why the Legislature should not extend this very beneficial Act to corporations as well as to individuals; and, notwithstanding the argument of the defendants' counsel, so powerfully addressed to the nerves, I think corporations such as the defendants should form no exception.

CAMERON, J., concurred.

Judgment for defendants on demurrer.

REGINA V. FRAWLEY.

Liquor License Act—R. S. O. ch. 181—Conviction for a third offence.

On a motion to quash a conviction by a Justice of the Peace, which had been appealed to the County Judge, an objection that the writ of *certiorari* was improperly directed to, and returned by, the Clerk of the Peace and County Attorney, instead of the County Judge or magistrate, was overruled.

Sec. 51 of the Liquor License Act, R. S. O. ch. 181, which imposes the penalties, omits all reference to a third offence, (which was provided for in the enactments of which it is a consolidation,) though such an offence is referred to in sec. 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction for a third offence was therefore quashed, although the penalty imposed thereby might have been inflicted for a second offence.

THE defendant was convicted on the 5th of April last, before the police magistrate of the town of Chatham, for selling liquor without license, contrary to sec. 39 of ch. 181, R. S. O.

The conviction set out two former convictions of the defendant; one, on the 23rd of August, 1876, for unlawfully keeping in his house spirituous liquors for the purpose of trading or bartering the same without license; and the other, on the 4th of April, 1877, for a similar offence. The conviction then adjudged the offence firstly mentioned to be the defendant's third offence against the liquor license Act, and that he should be for the said third offence imprisoned for three months, with hard labour, in the common gaol of the county of Kent.

From this conviction the defendant appealed to the County Judge sitting in Chambers.

On hearing the appeal the County Judge confirmed the conviction for selling liquor, upon the merits, and allowed the same to be amended by inserting the words "for the purpose of trading and bartering therein."

The conviction, information, and depositions, &c., were returned into this Court upon a writ of *certiorari*, directed to the Chairman of the General Quarter Sessions of the Peace for the county of Kent, and to William Douglas, Esquire, Clerk of the Peace and County Attorney for that

county. They appeared to have been in the custody of Mr. Douglas, by whom the return was made to the writ.

June 2, 1880. *Ogden* obtained a rule *nisi* to quash the conviction, on the grounds, among others:

1. That the conviction was alleged to be for a third offence, and the punishment awarded was the same as for a second offence, and no punishment was provided by the statute for a third offence.

2. The conviction was for a third offence, while one or both of the alleged previous convictions was or were for offences against a repealed statute, and not against the Liquor License Act now in force.

3. The conviction imposed imprisonment, with hard labour, which was *ultra vires* the Legislature of Ontario, and the statute awarding punishment by imprisonment and hard labour for an offence against the said Act was unconstitutional, and the said conviction should not have been amended by the said Chairman of the Sessions upon the said appeal.

Hodgins, Q.C., shewed cause, before Osler, J., sitting alone, objecting that the conviction and proceedings were not properly before the Court, as the County Attorney was not by law the custodian of them, and the writ of *certiorari* was therefore improperly addressed to him. He argued that they should have been in the custody of the Judge of the County Court of the County of Kent, who had them before him upon an appeal from the conviction. The case came before the County Judge sitting in Chambers, and the Clerk of the Peace is not his clerk in Chambers. The proceedings should have gone back to the magistrate, with the order to amend his conviction, and the return should have been made by him. As to the objections to the conviction being for a third offence, sub-sec. 6, of sec. 73, R. S. O. ch. 181, interprets the meaning of the term second offence in sec. 51, and the schedule H., giving the form of a conviction for a third offence, is made part of the statute. The repeal of the former statutes is not to affect proceedings and penalties: 40 Vic. ch. 6.

The power to amend is given to the magistrate and County Judge by sec. 77 of ch. 181, and sub-secs. 8, 15, and 16, of ch. 75, R. S. O., and the magistrate could amend independently of the statute: *Charter v. Graeme*, 13 Q. B. 216. The decision in *Regina v. Boardman*, 30 U. C. R. 553, is recognized and approved as illustrating the necessary and incidental powers of the Provincial Legislature to enforce obedience to its statutes: *Regina v. Roddy*, 41 U. C. R. 296, *Ulrich v. National Insurance Co.*, 42 U. C. R. 157, and is only weakened by an observation of Harrison, C.J., in *Regina v. Lawrence*, 43 U. C. R. 164. The power to impose imprisonment with hard labour for a breach of their by-laws was conferred upon all municipal councils, in 1851, by 14 & 15 Vic., ch. 109, schedule A. No. 7, and was continued by 22 Vic., ch. 99, sec. 242, sub-sec. 8; C. S. U. C., ch. 54, sec. 243, sub-sec. 8; 29 & 30 Vic., ch. 246, sub-sec. 8, and ch. 53, sec. 203; and for the enforcement of their by-laws regulating liquor licenses, and the Saturday night clause, by 22 Vic., ch. 6, sec. 2, C. S. U. C., ch. 54, sec. 255, and 29 & 30 Vic., ch. 51, sec. 258. This power became part of the law affecting municipal institutions when the B. N. A. Act was passed, and must be held to have vested as an express or incidental power in the Provincial Legislature under sec. 129, and sec. 92, sub-secs. 8 and 15, of that Act, and that Legislature has exercised such power in 32 Vic., ch. 32, sec. 24; 32 Vic., ch. 36, sec. 202; 36 Vic., ch. 48, sec. 372, sub-sec. 13; 38 Vic., ch. 28, sec. 30; R. S. O., ch. 174, sec. 160, sub-sec. 3, sec. 454, sub-sec. 14; ch. 180, sec. 216; ch. 181, secs. 51, 52, 55, &c.

Ogden contra. The conviction is bad, inasmuch as the magistrate had no authority or power to find defendant guilty of a third offence. Sec. 51 only provides penalties for first and second offences against sec. 39. Sec. 73, sub-sec. 6, only provides that when a person is charged with an offence against a particular section of the Act, previous offences against other sections shall be considered as offences against the section under which he is charged, but it does not provide a penalty for a third offence against

sec. 39. Furthermore, sec. 73, sub-sec. 6, was first enacted in 1877, and the first offence proved against defendant occurred in August, 1876, and was an offence against another section; therefore sub-sec. 6 cannot operate so as to constitute this the third offence. The County Court Judge had no power to amend the recital as to the previous offences in the conviction, although he might possibly have power to amend the conviction proper. Neither had the magistrate power to amend, as he has done here, upon the return of the papers from the County Judge. This Court will not amend the conviction, as the penalty imposed is unauthorized, and it is uncertain what penalty should be imposed, and the defendant is now imprisoned: *Regina v. Lawrence*, 43 U. C. R. 164; *Regina v. Black*, 43 U. C. R. 181. The local Legislature had no power to pass an Act imposing *hard labour* for an offence against the statute. Sec. 92, No. 15, of the Confederation Act, only provides for punishment by *fine, penalty, or imprisonment*, for enforcing any law of the Province: *Regina v. Black, supra*; *Regina v. Roddy*, 41 U. C. R. 291. The case of *Regina v. Boardman*, 30 U. C. R. 553, does not decide the contrary, as the learned Chief Justice seemed to think when deciding *Regina v. Black*. See also *Re Lucas and McGlashan*, 29 U. C. R. 81. The penalties provided for enforcing the Act respecting municipal institutions, in force prior to confederation, afford no evidence that it was intended the local Legislatures were to have power to impose like penalties. The objections to the return to the *certiorari* should have no force. The conviction and papers being here, the conviction may be quashed: *Regina v. Hellier*, 17 Q. B. 229. Even though it could not be quashed, the prisoner may be discharged: *Regina v. Levecque*, 30 U. C. R. 509. The return to the *certiorari* is properly made by the Clerk of the Peace, as he is the proper officer: *Regina v. Yeomans*, 6 Pr. R. 66; *Gude's Prac.*, vol i., p. 217. The objections might form a ground for quashing the *certiorari* on a motion for that purpose, but are taken too late.

June 15, 1880. OSLER, J.—I think the objection taken by Mr. Hodgins cannot prevail. The papers were in fact in Mr. Douglas's official custody, and having been returned into this Court with the writ they are in very properly before me: *Daniel v. Phillips*, 4 T. R. 499; *Burn's Justice*, vol. i., p. 642.

Several objections were taken to the conviction, but I shall refer only to that one upon which I dispose of the case, namely, that the magistrate had no jurisdiction to convict or impose any penalty for a third offence, as such, under the 51st section of the Liquor License Act.

The penalty for selling, or keeping liquor in the house for the purpose of selling, bartering, or trading therein, is imposed by the 51st section of the Act. This section is a consolidation of the 37 Vic., ch. 32, sec. 35, and 39 Vic., ch. 26, sec. 20. As those sections stood at the time of the revision of the statutes the case of a third offence was provided for, the punishment for a first offence being a fine of not less than \$20 besides costs, nor more than \$50 besides costs; for a second offence, imprisonment with hard labour for a period not exceeding three months; and for a third, or any subsequent offence, for a period of *not less* than one, nor more than three, calendar months.

By 40 Vic., ch. 18, sec. 16, (which now forms section 73 and sub-sections of ch. 181, R. S. O.,) the procedure in cases where a former conviction was charged was provided for, and sub-sec. 5 (sub-s. 6 of sec. 73 of the Revised Statute) enacted that if any person who had been convicted of any offence against any provision of any of the sections of the License Act, except that relating to sales between Saturday night and Monday morning, should be afterwards convicted of an offence against any provision of the said sections, such conviction should be deemed a conviction for a second offence against section 35 of the License Act (sec. 51 of the Revised Statute,) and might be dealt with and punished accordingly, although the two convictions might be under different sections; and that in case any such person should be afterwards again convicted of a contravention of any provision of any of

the said sections, such conviction should in like manner be deemed a conviction for a third offence within the meaning of section 35, and might be dealt with and punished accordingly.

In the Revised Act section 51 omits all reference to a third offence, for which a minimum punishment of one month, and a maximum punishment of three months' imprisonment, with hard labour, had been fixed by the former Act, while the punishment for a second offence is left as before, viz., a maximum imprisonment for three months, with hard labour.

Section 73, sub-sec. 6, of the Revised Act, however, dealing with the procedure in cases where a previous conviction is charged, refers to section 51 as if it still provided for a third offence. It is in fact a transcript of sub-sec. 5 of 40 Vic. ch. 18, sec. 16, the whole of which had an appropriate meaning so long as a third offence was provided for.

I have not been able to trace any authority for the change thus made by the 51st section of the Revised Act. It was not a formal change, or the omission of something which was merely surplusage, for though the maximum punishment for a second and third offence was the same, the minimum punishment for the latter was fixed at one month.

However this may be, as the Act now stands, there can be no conviction made or punishment awarded for a third offence, as such, and the reference to it in sec. 73, sub-sec. 6, and the form given in the schedule H., are misleading, the latter being described as a form of conviction for a third offence, and setting out two prior convictions

Section 52, which provides for accumulating penalties up to a fourth offence against the provisions of sec. 43, has no bearing on this matter.

The conviction here is for a third offence, and the maximum penalty of three months' imprisonment with hard labour has been inflicted. The magistrate might have imposed the same or a lesser penalty on a conviction for a second offence. But it is impossible for me to say what he would have done, inasmuch as he had an absolute dis-

cretion in this respect. There is nothing in the conviction, or the papers returned, from which I can be assured that in imposing the highest penalty he did not award part of it in view of the two former convictions; nor is there anything from which I can see that the appropriate penalty or punishment was intended to be awarded. For the same reason there is nothing by which I can amend the conviction under sec. 77, as amended by 41 Vic., ch. 14, sec. 10, for if all reference to the earliest or the intermediate conviction is struck out, how can I be sure that the magistrate would have imposed the maximum penalty? *Regina v. Black*, 43 U. C. R. 181; *Regina v. Lake*, 7 P. R. 215, 233.

The conviction must be quashed, but without costs, and the rule made absolute.

Rule absolute.

FARLINGER V. McDONALD.

Chattel mortgage—Affidavit—Debt payable at future day.

The affidavit annexed to a chattel mortgage omitted the words, "or accruing due," after those "so justly due": *Held*, that the debt might be stated as due when it really was due, and that it need not be necessarily stated as either due or accruing.

The mortgage shewed the debt in the proviso as only becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence shewed it was given to secure an overdue debt: *Held*, that the mortgage could be upheld, regarding it as given for a present debt to be paid at a future day.

The affidavit stated that the mortgage was not granted for the purpose of protecting the goods and chattels against the creditors of the two mortgagors, naming them, or preventing the creditors of *the said mortgagor* from obtaining payment of any claim against *him, the said mortgagor*: *Held*, sufficient, for that the word mortgagor would mean each of the mortgagors previously mentioned.

REPLEVIN.

Pleas: 1. *Non cepit*. 2. Traverse of property. 3. That the property was in defendant.

Issue.

The trial took place at Cornwall, before Patterson, J. A., without a jury.

The facts were as follow :—

One Pruner held a farm as tenant to plaintiff. Rent was in arrear, and on 7th April, 1879, a distress warrant was issued by plaintiff for \$501.20, arrears due 1st March, 1879, and a seizure was made.

At the sale there were several bidders, and plaintiff's son attended and, under his father's directions, bought in articles to the extent of \$306.25. The son swore that plaintiff told him that Pruner had asked him to buy the things in, and plaintiff said if they went for the full value he would not, but if they went under value he would save them. Those that went under their value witness bought in for plaintiff.

The plaintiff said he told his son if they went for their value to let them go: that he did not want to have anything to do with them. Plaintiff said Pruner asked him the day before the sale to buy them in: that he would prefer to have time than to be thrown out. He said plaintiff might do as he liked.

The bailiff proved the sale, and that plaintiff's son bought all the things except a wagon. The son bid most, and he knocked the things down to him.

At the foot of the warrant was a memorandum :—

Amount distrained for	\$501 20
Bailiff's Charges	23 08
	<hr/>
	\$524 28
Amount of Sale	306 25
	<hr/>
	\$218 83

The son bought up to \$306.25. The bailiff said they brought a fair value.

After the sale the bailiff left the things on the place with the plaintiff's son. Pruner, the tenant, said he told plaintiff's son if the things did not go for the value

he should buy them up. He (witness) did not want to see them sacrificed. He wanted to get all he could on the rent.

Immediately after the sale an arrangement was made by which Pruner was hired by plaintiff as his servant at \$15 per month, and he continued living on the place with the stock as before. Plaintiff said: "After the sale Pruner asked me what I was going to do with him, and I came to the conclusion we would give him another chance; so I hired him. He said with his mother and family he did not know what to do. I said I had confidence in him, and I would try him for a year, and give him wages."

About the 8th of May following the defendant seized these goods under a chattel mortgage, dated 7th October, 1878, made to him by Adam Pruner, the tenant, and Martin Pruner, to secure money to be repaid 7th October, 1879. The condition was that they should repay the amount and interest to "become due and payable on 1st November, 1879." When seized the goods were on plaintiff's farm, Pruner being there, as before stated.

It was objected to the mortgage that the affidavit was insufficient. The words were:

"That the said bill of sale by way of mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due as afore-said, and not for the purpose of protecting the goods and chattels mentioned in the said bill of sale by way of mortgage against the creditors of the said Martin Pruner and Adam Pruner, the mortgagors therein named, or preventing the creditors of the said mortgagor from obtaining payment of any claim against him, the said mortgagor."

It was objected that the words "or accruing due" were left out, and by the terms of the mortgage it was accruing due and not due. Also, that it spoke of "mortgagor" and "him," there being two of them.

The learned Judge assessed the damages at \$75, and found for the plaintiff, on the ground that he received the goods from his tenant in payment of rent.

May 20, 1880. *McCarthy*, Q. C., obtained a rule to enter a verdict for defendant, or for a nonsuit, on leave reserved, on the grounds: 1. The goods were not the property of the plaintiff, but of defendant. 2. The pretended sale by plaintiff's bailiff under the distress could not pass the property in the goods. 3. The evidence shewed that there was no rent in arrear at the time of the distress. 4. The distress was illegal and irregular, and no property passed in the goods. 5. Defendant's possession under the chattel mortgage, and his right of property by virtue thereof, being good as between him and his mortgagor, could not be disputed by the plaintiff.

June 4, 1880. *Richards*, Q. C., shewed cause. The objections to the mortgage are good. He referred to *Harding v. Knowlson*, 17 U. C. R. 565; *Tyas v. McMaster*, 8 C. P. 449.

McCarthy, Q. C., contra. The mortgage is perfectly good notwithstanding the objections urged against it. *Squair v. Fortune*, 18 U. C. R. 550, shews that the affidavit may state the debt to be either due or accruing due, and as for the objection that the mortgage states the debt as only accruing due, the consideration was stated to be the price paid for the goods, and it was proved to have been given for a debt past due. Then, as regards the singular number "mortgagor" being used instead of the plural, the current of authority is in favour of upholding the mortgage against the objection. He cited *King v. Gay*, 4 B. & S. 782; *Woods v. Rankin*, 18 C. P. 44; *Fraser v. Bank of Toronto*, 19 U. C. R. 381; *Taylor v. Ainslie*, 19 C. P. 78; *Mathers v. Lynch*, 28 U. C. R. 354; *Mason v. Thomas*, 23 U. C. R. 305; *McLeod v. Fortune*, 19 U. C. R. 100; *Balkwell v. Beldome*, 16 U. C. R. 203.

June 26, 1880. HAGARTY, C. J.—If the defendant's mortgage is a good security as against the plaintiff, it seems clear to us that the latter cannot rely on his right as landlord acquiring property by the bailiff's sale. The cases of *Grey v. Williams*, 23 C. P. 561; *Burnham v.*

Waddell, 28 C. P. 263, and in appeal, 3 App. 388, following *King v. England*, 4 Best & Sm. 782, are clear on the point.

If therefore the goods when the landlord got them were not the goods of Pruner, the tenant, but of defendant, the mortgagee, the plaintiff obtained no property in them.

But it is urged that as between tenant and landlord the latter could become purchaser, taking the goods as so much payment of his rent, and that he could do this equally in the way it was done by bidding at the sale, or by purchase or arrangement, without the intervention of the bailiff or the distress warrant.

I think he could purchase by arrangement, so as to pass the property between himself and Pruner.

If so, it is then urged that he is a purchaser for value, and as such can object to defendant's mortgage as invalid under the statute.

Pruner, the tenant, could not deny that the property had passed to his mortgagee, but the plaintiff insists that he, as purchaser for value, can take all the statutable objections.

As to the first objection, omitting the words "accruing due", in *Squair v. Fortune*, 18 U. C. R. 550, it was held sufficient to state it in the alternative words of the statute. I think it may be stated as due when it really is due according to the mortgage, and that it need not necessarily state it as either due or accruing.

But it is urged that the mortgage here shews and states the debt in the proviso as only becoming due and payable at the future day.

The consideration for the transfer of the property was stated to be money then acknowledged to be paid therefor, and the evidence shewed that it was given to secure a debt overdue.

I think we may uphold the mortgage against this objection, regarding it as given for a present debt to be paid at a future day.

The other objection seems more serious: "against the creditors of the said Martin Pruner and Adam Pruner, the

mortgagors therein named, or preventing the creditors of the said mortgagor from obtaining payment of any claims against him, the said mortgagor. "Him" should have been "them," and "mortgagor" should have been "mortgagors."

I have looked at all the cases cited, and have not found one directly in point. *Harding v. Knowlson*, 17 U. C. R. 565, held that "preventing the creditor of such mortgagor," instead of "creditors," was fatal.

There seems a good reason for this, as it might be true in respect of one creditor and not as to the others.

In *Fraser v. Bank of Toronto*, 19 U. C. R. 385, "creditors" was held sufficient, without adding "or either of them." In *Taylor v. Ainslie*, 19 C. P. 84, "Creditors of the said mortgagors" includes the creditors "of any or either of them."

In *Tyas v. McMaster*, 8 C. P. 449, the bill of sale was to two parties, one of whom made affidavit that the assignment was *bonâ fide*, &c., &c., "and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor." Draper, C. J., held "the use of the singular 'bargainee,' instead of 'bargainees,' does not in reality affect the sense. It may be read as meaning either bargainee, for each of the plaintiffs is a bargainee. The fraudulent intent is, I think, fully negatived by the affidavit."

This last case seems the nearest to the present. Where the two grantors are first called mortgagors, and then the "creditors of the said mortgagor" are mentioned, it would seem right to hold that under the singular "mortgagor" each mortgagor is included, and that "any claims against him, the said mortgagor," includes all claims against either or both. "Him, the said mortgagor," cannot be held to apply only to one.

If perjury were assigned I hardly see how the defendant could be heard to say that either mortgagor, or only one mortgagor, was meant. The two are first specially mentioned and described as "mortgagors." After that, it

seems to me, that when "said mortgagor" is spoken of, it necessarily means both the persons called or described previously as "mortgagors."

Not without some doubt I venture to uphold this affidavit.

It is not a question of omitting any statutable requirement, but as to whether the words used, which are those of the statute, are sufficient in substance to meet the fact of there being two instead of one mortgagor.

If we can uphold the mortgage against the objections, there is, of course, an end to the plaintiff's case, as we must hold that he could not acquire the goods, as against defendant, the legal owner.

Looking at his claim as acquired merely by purchase from his tenant, he would be open to the objection that there was no sufficient change of possession, on the evidence, as against subsequent purchasers or creditors. It is a singular result, if a man purchasing from another, but leaving that other in such a position that there is no sufficient change of possession, can defeat the claim of a prior transferee for value, on the very ground of the want of such change of possession, and the non-compliance with statutable formalities to make up therefor.

ARMOUR, J.—I agree with the learned Chief Justice in thinking that the chattel mortgage can be supported against its alleged defects.

But admitting the chattel mortgage to be, by reason of its defects, invalid as against creditors and subsequent purchasers or mortgagees in good faith for valuable consideration, I cannot bring my mind to the conclusion that what was done had the effect of passing the property mentioned in the chattel mortgage to the plaintiff, so as to deprive the defendant of it.

There is nothing in the evidence which leads me to the conclusion that Pruner ever made a sale of the property to the plaintiff, or that any other sale took place, or was intended to take place, except the sale under the distress warrant.

The sale relied on by the plaintiff's counsel in opening the case was the sale under the distress warrant; the plaintiff's son swore that the sale was a sale under the distress warrant for rent, and the whole evidence points, in my view, to the fact that the sale under the distress warrant, and that alone, was the sale relied on by the plaintiff as vesting the property in him.

I do not think, having regard to the law as laid down in *King v. England*, that such a sale could have the effect of vesting the property mentioned in the chattel mortgage, which at the time of the sale was, as between Pruner and the defendant, the property of the defendant, in the plaintiff.

I think, therefore, the rule should be absolute to enter a verdict for the defendant.

CAMERON, J., concurred.

Rule absolute to enter verdict for defendant.

McSHERRY V. THE COMMISSIONERS OF THE COBOURG TOWN TRUST.

Cobourg Harbour Commissioners—22 Vic. ch. 72—Corporation—Pleading—Amendment.

The plaintiff sued "The Commissioners of the Cobourg Town Trust," in whom the harbour at Cobourg is vested in fee by 22 Vic., ch. 72, for damages for loss of his vessel, caused by the negligence of defendants, who by their plea merely traversed the negligence. At the trial plaintiff was nonsuited, on the objection that defendants were sued as a corporation, but were not so under the statute.

Held, that this objection should have been raised by plea, and was not open to defendants on this record; and *Seemle*, that if open, defendants were a corporation.

Leave was granted to amend, if desired, by substituting the names of the Commissioners.

DECLARATION: That by statute 22 Vic., ch. 72, the Cobourg harbour was vested in the defendants, and that they were guilty of negligence in not maintaining the harbour lights, whereby plaintiff's vessel was wrecked.

The second count was to the same effect.

The third count stated that in consideration of plaintiff paying certain tolls for his vessel defendants undertook to keep lights burning; breach, neglect so to do, and loss.

Pleas: 1. Not guilty.

2. That the vessel was lost by plaintiff's default.

3. To the last count, denial of the promise.

At the trial at Cobourg, before Burton, J. A., plaintiff was nonsuited, on the ground that under the statute defendants were not incorporated, the learned Judge also deciding that he had not the power to amend by adding or substituting the individual names of the commissioners.

May 17th, 1880. *Bigelow* obtained a rule *nisi* to set aside the nonsuit, to which, May 27th, 1880, *J. K. Kerr*, Q. C., shewed cause. The whole question is, can the defendants be sued by the corporate name? No doubt they should not have been, but by their individual names, as commissioners. What is said on this point in *Standly v. Perry*, 3 S. C. 356, is not binding upon the Court, being the opinion of a single Judge only, not necessary for the decision of the case. *The Commissioners of Peterborough Town Trust v. Cochrane*, 13 C. P. 111, is in point, and is binding upon the Court. This case is supported to some extent by *Williams v. Commissioners of the Admiralty*, 11 C. B. 490.

Bigelow, contra. The defendants are a corporation. It is not necessary that the word "incorporated" should be in the Act. The incorporation may be inferred: *Conservator of River Tone v. Ash*, 10 B. & C. 349. Corporations are a number of persons joined together for a designated purpose, and have a name in their joint character: *Bridgewater and Taunton Canal Co. v. Bluett*, 10 B. & C. 393. The Act creates the commission, specifies the purpose, provides for filling vacancies, vests the harbour, &c., in the commission, gives it a name, requires the appointment of a secretary, and names the first members of the commission. When thus united, C. S. C., ch. 5, sec. 6, sub-sec. 24, confers all the powers incident to a corporation, viz.: power to sue and be sued, to contract in their corporate name, to have a

common seal, to have perpetual succession, and to acquire property; the right of the majority to bind the minority; and exempts individual members from personal liability. This action is maintainable against the defendants in the statutory name though they are not a corporation. The objection should have been raised by plea: *Wolfe v. City Steamboat Co.*, 7 C. B. 103. At all events the amendment asked at the trial should have been allowed: *Podmore v. Schmidt*, 17 C. B. N. S. 725; *Ellston v. Deacon*, L. R. 2 C. P. 20.

June 26th, 1880. HAGARTY, C.J.—22 Vic., ch. 72, vests the Cobourg harbour, with other properties, in five commissioners, to be held in fee simple upon the trust therein-after declared, “and the said trustees shall be called ‘The Commissioners of the Cobourg Town Trust.’”

Section 2 says the property shall be held by said commissioners in trust to pay the expenses of management, to keep the properties in repair, to insure, &c.

Power is given to them to raise money, by way of loan, on the credit of debentures to be issued.

The mayor and town council are to issue debentures under their corporate seal, signed by the mayor and treasurer, and by the secretary of the commissioners.

By section 5 the commissioners might exchange such debentures for outstanding harbour or other debentures, &c., and also issue new debentures, if required, from time to time, to raise funds to retire those that should be outstanding.

By section 6 a sinking fund is to be established, to be invested by the trust commissioners. And the harbour shall be under the control of said commissioners, who shall levy tolls, appoint officers, and exercise all the powers now possessed by the corporation.

Section 7 names the five commissioners, “and they shall hold all the said property, in fee simple, upon the trusts aforesaid.”

Section 8 provides, that in the event of the death,

removal, or resignation, of any of the said commissioners, the vacancy shall from time to time be filled by the town council, who are empowered to appoint a new commissioner; and "thereupon the said property shall vest in such new commissioner along with the commissioner or commissioners, who shall still retain office upon the same trusts as are hereinbefore declared."

By section 14 the said commissioners shall have power to make leases of said properties, and to collect rents, and apply the same to said purposes.

In 1861 an Act was passed respecting the town of Peterborough, 24 Vic., ch. 6, evidently copied from the Cobourg Act. The wording in all the parts respecting "The Commissioners of the Peterborough Town Trust" is identical, and on the argument of this case counsel admitted the two Acts could not be distinguished. There is a decision on this later Act by the Court of Common Pleas—*The Commissioners of Peterborough Town Trust v. Cochran*e, 13 C. P. 111—and it was held after argument that the plaintiffs were not a corporate body. Judgment was given by Draper, C. J., A. Wilson and J. Wilson, JJ., apparently assenting.

Draper, C. J., says: "With the exception of declaring that the five individuals, who are made trustees of the property, shall be called 'The Commissioners of the Peterborough Town Trust,' I see nothing in the foregoing enactments to lead to the conclusion that they are erected into a corporation. I rather infer that the Legislature intended that the five individuals named, and their successors, appointed as directed, were simply to be trustees, as in fact they are expressly called. The mere fact that a power is given to supply vacancies no more indicates an intention to erect a corporation than similar provisions in any trust deed would do, and the conclusion apparently lies the other way, for if the commissioners were erected into a corporation the real estate would have vested in the corporate body, and the provision that it should vest in the new commissioner with the remaining ones would be super-

fluous ; for in that case every new commissioner would be a member of the corporate body in which the estate was already vested. There is not even authority given to a majority of the commissioners to execute any of the powers conferred, and without it they appear to me to be in the position of ordinary trustees."

He said he had had doubts whether, though not a corporation, they might not be sued by the name given in the statute, but in the absence of any enactment such as was in the case of *Williams v. The Commissioners of the Admiralty*, 11 C. B. 490, he concluded it should not be so.

In the case cited the statute declared that in actions they should be called by the name prescribed in the Act. Although not a corporation, it was not necessary to name them individually.

In a late case in our Supreme Court, *Standly v. Perry et al.*, S. C. Rep. 372, the suit was against these Cobourg Commissioners individually. The plaintiff failed in the result. The judgment of the Court is delivered by Strong, J. He says : " Before concluding, I think I ought to notice an objection to the constitution of this record, which, though not raised in the answers of defendants, nor made in argument, appears to me a serious one. By the Act of 1859 the Commissioners of the Cobourg Town Trust are legally incorporated. It is true that the words corporation or incorporated are not used, but the legal effect of the first section clearly is to constitute the individuals named a corporation. The corporation ought therefore to have been at least a party to the cause, and in my judgment the sole party."

It was not necessary for the decision of the case that this point should have been decided ; but it is an expression of very decided opinion from the highest Court on the very point in controversy here.

It is important to note that these defendants have chosen to appear to the writ in this action, and have in no way pleaded that they are not properly sued. They do not plead that they are not a corporation, or "*nul tiel corpo-*

ration," as the plea is called. Where plaintiffs claim to sue in a corporate capacity, and defendant wishes to deny their right so to do, it seems he should so plead. That was the plea in the *Conservators of the River Tone v. Ash*, 10 B. & C. 349.

In the case already cited, *Williams v. Commissioners of the Admiralty*, the objection that defendants were not a corporation came up on motion to set aside the writ. The writ had been served only on one of the defendants. Counsel argued that "if all were served they would be put to their plea of *nul tiel corporation*." Maule, J., says: "If the counsel for the plaintiff had been heard in *Wolfe v. The City Steamboat Co.*, 7 C. B. 103, they would probably have contended that defendants were estopped by the appearance from saying that they were not a corporation." Counsel answers: "Exactly so; defendants were bound to come promptly, and were not bound to wait until an appearance had been entered for them." At page 426 counsel argue: "If there is no such body in existence as that against which the writ is directed, the party who seeks to set aside the writ is not bound to appear."

Draper, C. J., in the Peterborough case, evidently was aware of the difficulty. It was a demurrer to the declaration, on the ground that defendants were not a corporation. He says: "I should add that neither in the Court below nor before us was any doubt suggested whether the point argued could properly arise on demurrer. Both parties seem to desire to have it determined whether the statute created the five persons named a corporation."

In this case the declaration does not expressly charge or assert that defendants are a corporation. It states that the harbour, &c., was vested in fee simple in defendants, "The Commissioners of the Cobourg Town Trust."

All this is literally true, and the name is given by statute to the defendants.

They do not deny that they are seised of, or in charge of the harbour, &c., but only offer a traverse of the negligence charged.

No evidence was called; a nonsuit was asked on the opening. The learned Judge's attention was not called either to the Supreme Court case or to the state of the pleading.

We think the nonsuit must be set aside, without costs, as the case should not have been stopped.

The plaintiff may either amend his declaration as advised, or abide by the view declared in the Supreme Court. We allow him to amend as advised.

CAMERON, J., concurred.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

Rule absolute.

TIMMINS V. WRIGHT.

Malicious arrest—Proof of affidavit and Judge's order.

Held, that the County Court Judge's order to arrest was well proved, under R. S. O. ch. 62, sec. 28, by the production of a copy certified as such, under the hand of the clerk of the Court; but that the affidavit on which the *capias* issued, filed in that Court, was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the Court, but not referred to or described in the certificate.

THE first count of the declaration was for malicious arrest, alleging that there was no debt due by the plaintiff to the defendant, the recovery of a verdict in favour of the plaintiff, and that the same had not been moved against.

The second count was for maliciously procuring a Judge's order on defendant's affidavit, falsely swearing that defendant was about to leave the Province, &c., &c.

The third count was for arresting plaintiff contrary to the provisions of a deed of covenant executed by defendant.

Pleas: Not guilty, and denying the termination of the

action, and the finding of the jury, with many other traverses.

Issue.

The trial took place at Cobourg, before Burton, J.A., and a jury.

The plaintiff put in an exemplification of the judgment of the County Court at Lindsay, which seemed regular.

To prove the defendant's causing the arrest in the first and second counts, he produced a copy of an affidavit, appearing to be made in that Court by this defendant, in the suit of *Wright v. Timmins*, certified thus on the back :

"I, William Grace, certify the within to be a true copy of the original affidavit of the plaintiff, filed in this cause.

" WM. GRACE, [L.S.]

" Clerk Co. Court., Co. Victoria.

<p>Seal " County Court, Victoria."</p>
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He also put in a document purporting to be a copy of the Judge's order to arrest, with a certificate annexed, thus :

"I, William Grace, of the town of Lindsay, in the county of Victoria, Clerk of the County Court of the said county, do hereby certify the annexed to be a true and correct copy of the order in the suit of Alfred Wright against Thomas Timmins, filed in my office on the 22nd day of April, A.D. 1879.

" WM. GRACE,

" C. C. Ct."

These were objected to as insufficient proof of the affidavit and order.

The learned Judge held them insufficient.

The plaintiff endeavoured to meet this objection by arguing that he could still proceed on the third count, for breach of the covenant not to arrest, molest, or trouble plaintiff, or his goods and chattels, for said debt, and sought to amend that count by striking out all reference to the *capias*. Defendant answered that if this were done the count would be bad, and he would demur thereto.

The learned Judge refused to amend as asked, and a non-suit was entered.

May 20, 1880. *Richards*, Q.C., obtained a rule to set aside the nonsuit, on the ground that there was evidence of the writ and arrest on the first and second counts: that the exemplification and certified copies of the order to hold to bail, and of defendant's affidavit, were sufficient evidence: that there was evidence on the third count, even if these documents were inadmissible; or for a new trial.

McCarthy, Q. C., shewed cause. The copies were not admissible in evidence. They are not examined copies, but merely certified: *Wren v. Weild*, L. R. 4 Q.B. 730.

Richards, Q. C., contra. There was ample evidence on the third count. The copies offered in evidence were perfectly admissible: *Spafford v. Buchanan*, 3. O. S. 391; *Garvin v. Carroll*, 10 Ir. L. R. 327.

June 26th, 1880. HAGARTY, C. J.—It seems to us that the exemplification was sufficient so far as it goes. But we do not see any authority for admitting the evidence of the affidavit.

Our statute does not seem to cover such a case. R. S. O., ch. 62, sec. 28, provides that "in every case in which the original record could be received in evidence, a copy of any official or public document in this Province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or a copy of any document, by-law, rule, regulation, or proceeding, or a copy of any entry in any register, &c., of any corporation, &c., purporting to be certified under the seal of such corporation, &c., shall be receivable in evidence," &c., &c.

Section 29, relates to books or documents of so public a nature as to be admissible on mere production from the proper custody, &c. A copy or extract may be admitted, on being proved to be an examined copy or extract, &c., or that it purports to be signed or certified as a true copy or extract by the officer to whose custody the original has been entrusted.

By section 30 all Courts shall take judicial notice of the

signature of Superior or County Court Judges appended to any decree, order, affidavit, &c., or judicial or official document.

If the County Judge's order to hold to bail had been produced from proper custody it would, on this clause, prove itself. It would, therefore, seem to fall under the sections 28 or 29, and be provable by a copy certified under the hand of the proper officer having its custody. It is "a document of so public a nature as to be admissible in evidence on its mere production from the proper custody."

It therefore seems that the certified copy of the Judge's order should have been received as evidence.

As to the affidavit we have great difficulty in holding that it was sufficiently proved.

It does not seem to fall under the words of either of these clauses. It can hardly be called an official or public document under section 28, nor a document of so public a nature as to be admissible on its mere production from the proper custody.

It is an affidavit filed in a cause in an inferior Court, although a Court of Record.

A different rule seems to have long prevailed as to an "office copy" *in the same Court* and cause, which is held equivalent to the document of which it is a copy. In *Roscoe on Evidence*, 14th ed., p. 97, and at p. 98, the subject of "examined copies" is treated.

At p. 114: "If the affidavit be filed in a Superior Court of law or equity an examined copy, or (in the same Court and cause) an office copy of it, is, in civil cases, evidence against the party by whom it has been used or acted upon, without proof of the handwriting of the person making it."

At p. 117 it is stated how judgments of a County Court baron, or other inferior jurisdiction, may be proved by production of the book or roll, and if not made up in form the minutes of the proceedings will be evidence, or an examined copy of them.

The English County Court Acts provide for the mode of proof of their proceedings.

In our case Mr. Grace, the County Court Clerk, put a seal—apparently that of his Court—on his certificate, and it was urged that this made it in the nature of an exemplification.

But it must be remembered that Mr. Grace's certificate does not in any way profess to be under or verified by the seal of the Court, and therefore we cannot know anything of the seal, whether genuine or not. It is affixed without any reference or explanation.

In *Spafford v. Buchanan*, 3 O. S. 391, this Court held that in an action for malicious arrest an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, was sufficient to prove it was made by defendant. At p. 393 it seems clear the copies were *examined* by the witness.

Robinson, C. J., says, p. 398, "That the affidavit remaining in the Crown office ought to have been received and acknowledged as a genuine affidavit, capable of being proved at *Nisi Prius* by a sworn copy, I think is fully established."

This case was followed in *Wilson v. Thorpe*, 18 U. C. R. 443. The original affidavit of arrest had been mislaid, but the Deputy Clerk of the Crown proved the copy produced to be a true copy, and that the writ issued thereon.

Mr. *Richards* cited *Garvin v. Carroll*, 10 Irish L. R. 327, (decided in 1847) where in the Queen's Bench an *attested* copy of an affidavit in a cause in the Court of Exchequer was allowed to be used to contradict a witness who had made such affidavit.

Crampton, J.: "It is a record of the Court, and it is for the public convenience that the originals should not be removed, and for that reason attested copies are allowed to be used." It is not shewn how an "attested" copy is verified. The term does not appear in *Roscoe*. The question was merely as to its admissibility to cross-examine and contradict a witness who was the deponent. One of the three Judges held it inadmissible. There is no discussion as to whether examined copies should not rather have been used.

Our C. L. P. Act, sec. 180, authorizes parties in Superior Courtsuits to prove writs, declarations, or other proceedings in the cause by certified copies from the Deputy Clerk of the Crown, where they may be filed.

On the whole, we think the affidavit alleged to have been made by the defendant in the County Court suit was not duly proved, and was properly rejected.

This would dispose of the first and second counts.

It was argued that the third count might be upheld on the evidence, as it was for breach of covenant, for arresting plaintiff contrary thereto.

The plaintiff could not prove the *capias*, and to go into secondary evidence all he could shew was a notice to Mr. McIntyre, the defendant's attorney, who was plaintiff's attorney in the former suit, to produce "all original papers." No search was made in the County Court office, where the writ ought to have been returned, and from whence it could have been exemplified.

We cannot hold such a notice sufficient, so far as we can judge its contents from the reporter's notes, as it is not filed.

The proper place for the writ would be the office of the Court, and we cannot hold, in the absence of any search there, that on this evidence secondary evidence can be let in.

Plaintiff asked to amend the third count. The learned Judge refused, as striking out all about the arrest and *capias* would leave it at best only a claim for nominal damages, even if sustainable at all on demurrer, which defendant proposed if the amendment were allowed.

We cannot, on the whole, do more for the plaintiff than allow him, if he desire it, to set aside the nonsuit on payment of costs ; if not, rule discharged.

CAMERON, J., concurred.

ARMOUR, J., not having been present at the argument, took no part in the judgment.

Rule accordingly.

VANVELSOR ET AL. V. HUGHSON.

Proof of lost deed—Memorial signed by grantee—Possession—Knowledge of patentee—C. S. U. C. ch. 88, sec. 3.

In ejectment it appeared that the lot in question had been granted in 1812, with other lots, to M. A. P., M., and P. In order to prove the alleged conveyance of the 13th February, 1816, by M. C. to W., which had been lost, the plaintiff put in a memorial thereof, registered December 19th, 1826, signed by the grantee, including an undivided moiety in all the land in the patent with other lands.

It was shewn also that W., in 1827, had mortgaged all the lands in this memorial with other lands, to a bank, which, in 1829, reconveyed them to the trustees under W.'s will: that in 1833, R. took a conveyance from the devisee of W. of three of the lots mentioned in the memorial, not including the lot in question; and that in 1834, proceedings were taken in partition on the petition of the devisee of W., under which this lot was assigned to W.

Possession had been held of this lot, not in accordance with the alleged lost deed, but by persons claiming under R.; but the Court held that the evidence failed to prove such possession for forty years, or that it was taken with the knowledge of W. or his devisee. The plaintiff claimed under a deed from such devisee executed in 1873.

Held, CAMERON, J., dissenting, 1. That there was sufficient proof of the lost deed from M. C. 2. That the plaintiffs claiming under W. were protected under the C. S. U. C. ch. 88, sec 3, as against the possession of R. his co-tenant for less than 40 years.

EJECTMENT, for the north-east half and all other parts of lot number ten, in the second concession west of the Communication road, in the Township of Harwich.

Defence limited to the north-east half of said lot.

The action was commenced on the 30th of June, 1876.

Plaintiffs claimed title, as tenants in common, under the patent from the Crown, under a deed of bargain and sale to them from Joseph Woods, who claimed under the will of James Woods, claiming under a deed of bargain and sale from Margaret McGregor, widow, one of the patentees, and co-heiress of another of them with Mary Ann Pattinson, and under said will by divers deeds and releases of the children and widow of said James Wood.

The defendant, besides denying the plaintiffs' title, asserted title in himself under and by virtue of a certain deed of conveyance in fee simple, dated November 12th, 1872, made by one John B. Sheldon to him, and by length of possession.

The case was tried by Galt, J., without a jury, at the Spring Assizes for 1879, at Chatham.

In support of their title the plaintiffs put in the patent from the Crown, dated May 16th, 1812, granting Lots 10, 13, and 14, in the 2nd concession, and lots 10 and 14, in the 3rd concession, westward of the Communication road, in the township of Harwich, to Mary Ann Pattinson, daughter of Richard Pattinson, of the township of Sandwich, in the county of Essex, Margaret Chabert, wife of James McGregor, of the same place, merchant, and Phillis Chabert of the same place, spinster, as tenants in common in fee.

They also put in a memorial, dated February 13th, 1816, registered December 19th, 1826, of an indenture of bargain and sale, dated February 12th, 1816, made between Margaret McGregor, widow of the late James McGregor, and James Woods, whereby the said Margaret McGregor, in consideration of £400, granted, &c., to the said James Woods, in fee, her undivided moiety of the said lands; also lot 23 in the 3rd concession, and lots 17, 18, 19, 20, 21, 22, 23, and 24 in the 5th concession eastward of the Communication road, in the said township of Harwich.

This memorial was executed by the grantee, James Woods, and its reception as evidence of the conveyance of which it was the memorial, was objected to on that ground.

James Woods died in 1828, having first duly made his last will and testament, bearing date the 10th day of May, 1827, whereby he gave and devised his real estate in the words following: "I give and devise all my real estate, of what kind and nature soever and wherever situated, to my sons James and Joseph, and to each of them and to their and each of their heirs, upon the following trust, that is to say, that they and each of them shall sell and convey, in fee simple, the whole or any part of my said real estate to any person or persons, at private or by public sale, for the purpose of paying my debts and of supporting my wife Elizabeth, and my daughters and youngest son, until they and each of them are and is otherwise provided for by marriage or otherwise. * * * * And after my debts

shall have been fully paid and discharged, and my wife and children provided for, and the youngest shall have attained the age of majority, my will is that the surplus, if any, of my said real estate so devised in trust as aforesaid, shall be equally divided, share and share alike, among all my children, including my said devisees and trustees then surviving, or the lawful issue of such as may have died after marriage."

The testator had, on the 1st day of June, A.D. 1827, mortgaged the lands conveyed to him by Margaret McGregor by the conveyance referred to in the said memorial, with other lands, to the Bank of Upper Canada, for securing the sum of £1,275 and interest. On the 7th of August, A.D. 1829, the Bank of Upper Canada re-conveyed to James Woods and Joseph Woods, the trustees under the said will, the said mortgaged lands, excepting lots numbers 17 and 18, in the 5th concession of Harwich

The plaintiffs put in a memorial, dated April 1st, 1834, registered April 11th, 1834, of a deed of bargain and sale, dated October 30th, 1833, made between Joseph Woods, surviving devisee in trust under the will of the late James Woods, the elder, deceased, and Arthur Robertson, containing these recitals: "Whereas the said Joseph Woods, as surviving executor of the said James Woods, deceased, is supposed to be indebted to the estate of the late Richard Pattinson, of Sandwich, merchant, deceased, in the sum of two hundred pounds currency; and whereas the said Arthur J. Robertson is the assignee of and is duly authorized by Richard Pattinson and Ellen Ross, (formerly Pattinson), and is the husband of Mary Ann, formerly Pattinson, who are the children of the said Richard Pattinson, for the payment of which sum the said Joseph Woods has agreed to convey the lands hereinafter mentioned to the said Arthur J. Robertson, his heirs and assigns for ever;" and whereby the said Joseph Woods, in consideration of the said sum of £200, conveyed to the said Arthur J. Robertson, his heirs and assigns forever, "the undivided one half part or share of and in lots 13 and 14 in the 2nd concession, and lot 14

in the 3rd concession west of the Communication road in the township of Harwich."

This memorial was executed by the grantee, and its reception was objected to.

The plaintiffs also put in an exemplification of certain proceedings for partition, taken under 2 Will. IV. ch. 35, in the District Court for the Western District, by which it appeared that in June Term, 4 Will. IV., and on June 23rd, 1834, Joseph Woods presented his petition to the said Court, and that partition of the said lands was made as follows: To the said Joseph Woods lot 10 in the 2nd concession, west of the Communication road; lots 19, 21, 23, and south half of 24, in the 5th concession, east of the Communication road; to the Bank of Upper Canada the easterly halves of lots 17 and 18, in the 5th concession east of the communication road; to said Robertson and his wife lot 10 in the 3rd concession, west of the Communication road; lot 23 in the 3rd concession, and the westerly halves of lots 17 and 18; lot 20, 22, and north half of 24, in the 5th concession, east of the Communication road.

The plaintiffs also put in a deed poll by way of release, dated the 4th of August, 1851, made by the beneficiaries under the will of the said James Woods, in favour of the executors and trustees under said will.

The plaintiffs also put in a deed, dated the 20th day of September, 1873, made between Joseph Woods, as surviving executor and devisee in trust under the last will and testament of the late James Woods, the elder, and as heir-at-law, or otherwise howsoever, and the plaintiffs, whereby said Joseph Woods, in consideration of \$2,000, granted to the plaintiffs, in fee, an undivided moiety of lots 10 in the 2nd concession, west of the Communication road, 20 and 22 in the fifth concession eastward, from the Communication road, as reckoned from the eastern boundary from Lake Erie, in the township of Harwich, said lots containing 800 acres more or less.

Joseph Woods was called as a witness. He said: "\$400 was what I got." * * "Q. Did you ever lay any claim

to these lands at all? A. I had lost sight entirely of lot 10 in the 2nd concession, and I think a lot or half a lot in the adjoining concession. I cannot account for it, but so it was. I think the other lot was 10 in the 3rd. It is the lot I conveyed to Stephens. Q. What about lots 20 and 22 in the 5th? A. I am sorry to say, in making that deed, I conveyed property I had not a shadow of a title to. Q. You had entirely lost sight of the other two lots—10 in the 3rd and 10 in the 2nd? A. I had. Q. Did you profess to own them at the time? How did you come to convey them to Mr. Stephens and his partner, Dr. VanVelsor? A. Mr. Stephens and Dr. VanVelsor, when they first proposed to purchase some of this property in Harwich, came to me in Bay City, and told me I had an interest in certain property there; and I told them I thought I had no interest in any properties they then mentioned. After a short parley in the hotel, they said I had an interest, which interest they wished to purchase. I had my doubts about that, but after a short parley, the sum of £100 was agreed upon as consideration money for any interest I might have. The price being agreed upon, we went over to Mr. Wilson's office, and he was requested to draw up a deed of conveyance from myself to Dr. VanVelsor and Stephens, and he drew that deed. * * I executed the deed, and I told them from the outset that I had no interest there, I thought, all the time losing sight of No. 10 in the 2nd, and part of No. 10 in the 3rd concession. At the time William Wilson was asked to fill up this deed, these gentlemen were asked to mention the lots they wished to convey. I don't think they gave me a list of the lots before that. But just at the moment it was very important to know what lots were covered by the conveyance. They were first mentioned. Q. Then they mentioned these lots to the lawyer, Mr. Wilson? A. It must have been mentioned by them, because I did not know what lots they wished me to convey to them. Q. When they did mention them, did it recall to your recollection any thing at all? A. Not at all, sir; I was in the

dark in regard to it. * * Q. When they mentioned the lots to you did it recall to your recollection that you did own any land? A. At the time I executed that, I really believed my interest was gone. Q. Had you been in Canada since 1865? A. I was away ten years. I came back in 1875. Q. Did you ever make any claim to either of these lots when you came to Canada? A. I had lost sight of them long before I left for the States. I never made any claim to them—very stupid, but I cannot help it. * * I had lost sight of this property. Q. 20 and 22 in the 5th—what had been done with those by you? A. That particular lot, 20 or 22, I think, was assigned by the commission to Robertson. I never had any interest in this lot at all. Q. That was in the record of partition, Robertson claiming through his wife, and you as representing your father's estate? A. It is very clear that I made a conveyance that I had no shadow of title to at all. * * I have not been on these lots. I was not aware of any one being in possession at the time I sold. * * I could never explain very well why the gentlemen were so anxious to secure my interest, and I never understood and never could arrive at any satisfactory conclusion until Dr. VanVelsor made a second visit to Bay City in regard to the remaining undivided half of this lot 10 in the 2nd concession. Then I supposed, when they talked of buying this 19 and 21 in the 5th concession of Harwich, they—I thought it was merely intended as a blind, and they wanted to get from me a conveyance of this No. 10 in the 2nd, which I gave them. I declined to give a conveyance of the other undivided half, so that if there was any title in the property left at all I ought to have it in the undivided half. There was no additional consideration offered me."

The plaintiffs' counsel tendered the evidence of one Williams, to prove that in 1854 he made enquiries into the state of the family of Count Chabert, the father of the then co-partners, patentees, as Mr. Williams believed, to prove the death of Phillis without leaving heirs of her

body. She and her husband, he said, died without issue, and she died intestate. Mr. Williams was not a relative of the family, and had no personal knowledge of the parties. The learned Judge rejected it.

Objections were taken to the recovery by the plaintiffs on the evidence adduced by them, but these objections were overruled.

The defendant put in a deed, dated November, 12th, 1872, from John B. Sheldon to him, of the land in question; also a deed, dated February 9th, 1872, from Arthur J. Robertson and others to the said John B. Sheldon of the same land. This last deed contained a recital of the marriage of Arthur Robertson with Charlotte Maria Bearda Butard on the 16th of September, 1840. No evidence was given to shew when the former wife of Arthur J. Robertson died, or whether he had any children by her.

The learned Judge entered a verdict for the defendant, reserving leave to the plaintiffs to move to enter it for them.

22nd May, 1879, *J. K. Kerr*, Q. C., obtained a rule *nisi* to set aside the verdict and to enter it for the plaintiffs for the lands claimed, or for so much as the Court might think them entitled to.

The case was twice argued, on the 22nd Nov., 1879, when *Robinson*, Q. C., and *Skane*, shewed cause, and *Atkinson* supported the rule, and again on 8th Feb., 1880, *Robinson*, Q. C., and *Houston*, shewing cause, and *Atkinson* supporting the rule.

The arguments of counsel sufficiently appear in the judgments.

May 22nd, 1880. HAGARTY, C.J.—The leading objection to plaintiffs' paper title is, that the alleged conveyance to James Wood by Margaret McGregor was not proved.

The patentees in 1812 were Mary Anne Pattinson, Margaret McGregor, and Phillis Chabert. One thousand acres were granted.

Then on December 19th, 1826, a memorial is registered of a deed, dated February 12, 1816, between Margaret McGregor, widow, and James Woods, conveying her undivided half in these lands and other lands therein mentioned.

This memorial is executed by the grantee. The deed has not been produced, and cannot be found. The plaintiffs claim under this deed.

This action was commenced on the 30th of June, 1876.

No entry seems to have been made on this lot 10, in the 2nd concession, nor any possession taken from 1816 downward under plaintiffs' title.

James Woods died in 1828, having in 1827 mortgaged the lands in the memorial mentioned, with other lands, to the Bank of Upper Canada, and in 1829 the bank re-conveyed all, except two lots, to his trustees.

We have to examine how the different parties interested in this lot have acted.

The defendant claims by length of possession, and by conveyance from John B. Sheldon. Sheldon was a purchaser from Arthur J. Robertson in 1872, and in the same year Sheldon conveyed to defendant.

I gather from the evidence that the defendants, or those they claim under, either entered under Robertson or attorned to him, as owner.

In October, 1833, Robertson took a conveyance from Joseph Woods, surviving devisee of James Woods, reciting a debt due by the deviser to Richard Pattinson (Robertson's father-in-law), by which Woods conveyed to him in fee an undivided moiety of three of the lots mentioned in the memorial of Mrs. McGregor's deed of 1816.

Then in 1834 came the partition proceedings. I think we must consider them as proved and binding. They recite that Woods and the wife of Robertson (a patentee) owned all these lands as tenants in common. This lot 10 was assigned with other lands to Woods, and various other lots to Mrs. Robertson and her husband; and as to the two lots, 17 and 18, which Woods had mortgaged to the Bank

of Upper Canada, and released by the bank, the partition awarded half of them to the bank and half to Robertson and wife in severalty.

The provision in our statute, that memorials twenty years old, if they purport to be executed by the grantor, or in other cases if possession has been consistent with the registered title, shall be sufficient evidence without the production of the instruments to which they relate, will not affect this case, in my judgment, as on a question like that before us we should so hold without its aid.

Many years ago I had occasion to examine this question very fully in the case of *Gough v. McBride*, 10 C. P. 166. I think the authorities up to that period are fairly collected in that judgment. Since then, *In re Higgins*, 19 Gr. 303, the Chancellor seems to adopt the same view in substance.

It is not necessary to repeat the view expressed in *Gough v. McBride*. I adhere to that decision. If this case rested on the same facts we would simply follow it as an authority.

A grantee forty or fifty years ago placing on the registry a memorial of an alleged conveyance to himself, which cannot now be produced, cannot rest alone on such a title.

If the possession and ownership of the property have for a series of years gone in accordance with such a claim, the general rules of law, as well as our statute, will avail to make out a *primâ facie* right.

In this case there has been no such possession. The land has been held by persons claiming under Robertson, who seems to have dealt with it as wholly his own. The difficulty is much increased here by the fact that a number of other lands appear to be included in this memorial.

It was strongly argued before us that any dealings or dispositions with any of the other lands cannot be looked at to aid the claim of title to this land in question. But it seems to me that this is too narrow a statement of the point.

Lord Eldon's words (cited in *Gough v. McBride*) are :

"The question in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing itself you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained."

I also refer to the very strong language of Lord St. Leonards, also cited in *Gough v. McBride*.

The plaintiffs claim under a deed in 1873 from Woods, devisee of an undivided moiety.

This action was commenced before the passing of the late statute shortening the period of limitation.

From before 1840 downwards parts of the whole lot 10 have been occupied by persons originally, as far as I can see, mere trespassers, but afterwards attorning to Arthur J. Robertson. This gentleman is conceded to have married Pattinson, one of the original patentees, and he had issue by her. I gather from the evidence and admissions of counsel that no claim has ever been advanced on behalf of Phillis Chabert, and that the patented lands were to be looked on as belonging to Mrs. Robertson and Mrs. McGregor, the surviving patentees, and that the deceased Mrs. Robertson's interest is represented by her husband, Arthur J. Robertson.

If we cannot hold this latter point as proved or admitted, we should have to direct further enquiry thereon.

The land was certainly in a state of nature when first trespassed on, and I see no evidence on which, as against the Woods family, we can hold that such possession was with their or any of their knowledge.

I think a forty years' possession of the land in suit, up to the 30th of June, 1876, when this action was brought, has not been proved.

If the defence on possession do not avail, then the only remaining question will be, whether the plaintiffs have proved title.

It seems to be clear that the Woods family have done many acts as to some of the lands mentioned in the memorial on the title thereby claimed.

If defendant fail on the Statute of Limitations, his only title is a deed from Sheldon, which he put in evidence, and Sheldon's deed from Robertson in 1872, conveying the whole north-east half of the lot. This latter deed recites that this and other lands were conveyed under a marriage settlement, dated 16th of September, 1840, to trustees by Robertson on his second marriage, and the conveyance to Sheldon made under the power of sale therein reserved to Robertson.

We are not informed as to whether Mrs. McGregor, the alleged grantor to Woods, left any descendants interested in asserting her rights. If not, her sister, who married Robertson, and the latter through her, would be the parties interested in her estate.

The first act done under the title asserted in the memorial was the mortgage to the bank.

The next appears to have been Robertson taking a conveyance from Woods, devisee of an undivided moiety in some of these lands, for a debt due to his wife's father Patterson. Now Woods had no shadow of right to make such a conveyance, except under title from Mrs. McGregor.

Then, under the partition of 1834, under statute 2 Wm. IV., ch. 35, reciting the ownership, and making formal division of the lands, Robertson has had assigned to him and his wife in severalty a number of lots, with which, we presume, he has dealt as sole owner, and the Woods family disposed of their share, except this lot sold to the plaintiffs. (If this be not strictly in evidence we could direct further enquiry.)

If defendant rested his defence on possession merely, we could not affect him by evidence of facts which might be binding on others.

A full consideration of the evidence fails to convince me of a forty years' possession of this land, so as to bar all claims. The 30th of June, 1836, would be the limit of forty years; I fail to see any adequate proof thereof.

There is no proof, certainly none as regards the present claimants, that the possession proved here was taken with

the knowledge of Woods, or his devisee, representing, as is asserted, the title of one of the grantees of the Crown.

It is not easy to understand clearly the actual possession of this lot. From the county treasurer's books it would seem that this lot 10 was assessed thus :

“ Jos. Woods, $\frac{1}{2}$ 100 acres, 1833 to 1849, £5 7s. 7d.”

“ Robertson, $\frac{1}{2}$ 100 acres, 1842, 1843, 1844, and 1850, £4 2s. 3d.”

Again : “ A. J. Robertson, $\frac{1}{2}$ No. 10, that the sum of £4 2s. 3d. be accepted herein, ending 31st December, 1850. 1842, 1843, 1844, and 1850. Total taxes.”

Again : 1852.

To whom assigned.

Lot 10.

Jane Cameron.

“ 10.

Non-resident.

Down to 1855 the north-east 100 acres are marked “ non-resident.”

Duncan Grant was agent for Robertson for about eight years, from about 1834 to 1844 or 1845. He says he looked after No. 10 for Robertson. He found Donald Cameron there, and he and Cameron executed a document produced, dated the 18th of September, 1837, by which he authorized Cameron to take possession of lot 10 for three years, pay £1 5s. annual rent, and make certain clearance, and to fence. This was under seal. Robertson's name is not mentioned in it.

On the 18th of January, 1859, we find a sealed memorandum from George Small, declaring that he occupied the north-east quarter of lot 10, as tenant of Robertson, the owner, for five years, at \$5 annual rent, and agreeing to pay taxes, &c., and to give up possession at any time, &c., &c.

On the same day James Small executes a similar document as to the south-east quarter of lot 10.

We also find a similar deed, of the same date, from Jane Cameron as to the west 100 acres of the lot. This is the widow of Donald Cameron. Her son John swears that she sold the east part to Small about 1855. Her son William said that up to about 1849 there was no one on the north-east half.

On the 1st of September, 1864, this William Cameron executed a similar acknowledgment to and lease from Robertson, for ten years, of the west 100 acres of the lot.

On the 30th of August, 1869, John Small and David Toll execute a similar instrument, under Robertson, as owner, of the north quarter, 50 acres of the lot, as tenants for one year from the 1st of September, 1869.

Declute, the person who seems to have been first there, about 1836, is sworn to have sold out to Cameron.

We cannot see distinctly on the evidence when the defendant Hewson first came, nor does it appear how Sheldon came to purchase. Sheldon's deed to defendant, in 1872, declares the land to be subject to a mortgage of \$2,880 to Robertson.

As already remarked, it seems impossible to find any reliable evidence of a forty years' possession of this north-east 100 acres. The only evidence is, as to the south 100 acres, where Small, Thornton, and Declute, had their clearings. In fact Tyrrell, who proved this latter occupation, said that he thought it was twenty-eight or twenty-nine years ago Cameron first chopped on the east half.

As all these occupations within the forty years were apparently without the knowledge of Woods, assignee of one of the patentees, it remains to consider the effect of this provision in our law.

The defendant Hughson is in direct privity with Robertson, and proved title through him as part of his defence.

Robertson could bar his co-tenants' rights by an exclusive possession for the required period.

I have come to the conclusion that, as between Woods and Robertson, and those in privity with them, that there is sufficient proof of the lost deed from Mrs. McGregor, the patentee. I think the facts before us bring the case within Lord Eldon's definition of the true question to be determined: "Whether the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing itself you will act

upon it as if you had it before you, and with an absolute certainty as to what it contained." I think we should say that we accept the secondary evidence as sufficient.

I cannot see how any one can have any moral doubt whatever as to the conveyance from Mrs. McGregor to Woods, and I see no legal objection to our acting on what we must believe to be the fact.

I can see no reason why the provision in our statute should not avail to one of two joint tenants, or tenants in common, as against his co-tenant and those claiming under him. If he can be barred by the exclusive possession of the co-tenant, there seems to be no reason why he should not also have the protection of the statutable exception when he had no notice of such possession.

In a case just reported in our Common Pleas, *Harris v. Prentiss*, vol. 30, p. 484, the point is raised by counsel, and answered on the other side, but the decision did not require its determination, and nothing is said of it in the judgment. No authority is cited by counsel, and I have not found one in our reports. Mr. Wallbridge urged that in the words of the original Act, 4 Wm. IV., ch. 1, sec. 17, notice to the grantee of the Crown, or his heirs or assigns, *or some or one of them*, should be sufficient to affect all. Mr. Bethune contra, urged that these words (in italics) were omitted in C. S. U. C., ch. 88, sec. 3, and so notice to one could no longer be held notice to the other holding in common.

The first Act says, that "until the person deriving title
 * * as the grantee of the Crown, or his heirs or assigns,
or some or one of them, by themselves, their servants or
 agents, shall have taken actual possession, * *
 the lapse of twenty years shall not bar the right of, such
 grantee, or any person claiming by, under, or through him,
 * * unless it can be shewn that such grantee, or person
 claiming by, under, or through, &c., had knowledge of the
 same being in the actual possession of some other person
 not claiming to hold by, from, or under the grantee of the
 Crown, (such possession having been taken while the lot
 was in a state of nature,) in which case the right * *

shall be deemed to have accrued from the time such knowledge was obtained."

The C. S. U. C., ch. 88, sec. 3, recasts this provision : "In the case of lands granted by the Crown, of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession, * * and in case some other person not claiming to hold under such grantee has been in possession, * * (such possession having been taken while the land was in a state of nature,) then, unless it can be shewn that such grantee, or such person claiming under him, while entitled to the land, had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee," &c., &c. This omits the words, "or some or one of them."

Then the Statute 27 & 28 Vic., ch. 29, amends this last clause by adding to it, that "no such action shall be brought, or entry made, after forty years from the time such possession was taken as aforesaid."

This Act was to come into force on the 1st of January, 1865, but not to affect pending suits.

The Revised Statutes of Ontario, ch. 108, sec. 5, sub-sec. 4, (following 38 Vic., ch. 16, O.) uses the same language.

The clause as to possession by one tenant in common, or joint tenant, &c., not to be deemed the possession of the other, may be also referred to : C. S. U. C., ch. 88, sec. 13 ; R. S. O. ch. 108, sec. 11.

In my view the clause as to wild land must be read as protecting the interest of each grantee of the Crown, if there be more than one. We must decide the case on the law as laid down in the U. C. Consol. Act, now for over twenty years the law of the land.

I find on the evidence that there was no actual possession or occupation of the north-east half of lot 10 until Robertson entered, as far back as 1837, when his agent made the demise to Duncan Cameron of the whole lot. I also find that Robertson from the first entered as claiming the land in its entirety. But for the statutable provi-

sion the estate of his co-tenant would have been barred. I also find that Woods had no notice of any entry, or possession, or occupation, of this land. As to Woods's ignorance of his right, I refer to *Doe Pettit v. Ryerson*, 9 U.C.R. 286.

On the whole, I think the plaintiffs entitled to a verdict for an undivided moiety. I have arrived at this conclusion not without doubt. I have treated the defendant as in privity with Robertson, and the main question, as to the secondary evidence, I decide as if the contest were directly between Woods and Robertson.

ARMOUR, J., concurred.

CAMERON, J.—The plaintiffs claim title to the land in question under a conveyance thereof from Joseph Woods, who is the surviving devisee in trust under the will of James Woods deceased, who claims under an alleged conveyance of this and other lands to him and his heirs and assigns, made by one Margaret McGregor, formerly Margaret Chabert, who was a tenant in common of the land under the patent from the Crown to her, Phillis Chabert, and Mary Anne Pattinson, who became the wife of Arthur John Robertson, under whom, besides denying the plaintiffs' title, the defendant claims title.

The defendant objects to the sufficiency of the proof of the conveyance of the land in question from Margaret McGregor to Joseph Woods, that being established only by the production of a memorial from the registry office, bearing date the 13th day of February, 1816, and purporting to be the memorial of an indenture of bargain and sale, dated the 12th day of February, 1816, registered on the 19th day of December, 1826, and signed by the grantee James Woods.

Upon the authority of *Gough v. McBride*, 10 C. P. 166, and *In re Higgins*, 19 Gr. 303, the possession not having been in accordance with the alleged deed, this in itself would be clearly insufficient to prove either the execution of the deed or its contents. But it is alleged on behalf of

the plaintiffs there are circumstances which exist and are proved that, taken in connection with the memorial, bring the case within the authority of *Scully v. Scully*, referred to in *Gough v. McBride*, where Lord Eldon says: "The question in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say that, as you have not the writing itself, you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained."

The other circumstances in the present case relied on are, that in 1827 James Woods mortgaged a large quantity of land, including the lot in dispute, to the Bank of Upper Canada, and in 1833 he conveyed by indenture of bargain and sale to the said Arthur John Robertson lot No. 14 in the 2nd concession, No. 13 in the 2nd concession, and lot No. 14 in the 3rd concession, west of the Communication road, in the township of Harwich, these lots being part of the lands included in the alleged deed from Margaret McGregor to James Woods; and lastly, Joseph Woods, as surviving devisee in trust, under the will of the said James Woods, filed, in June, 1834, a petition in the District Court of the Western District, claiming to own an undivided half in the lot in question with the other lands, and praying that partition of the same might be had, and on which petition a partition of the estate was ordered, and lot No. 10, the land in question, was by the judgment of the Court assigned to the said Joseph Woods.

To the proceedings in the Western District Court the said Arthur John Robertson, Mary Anne Robertson his wife, and the Bank of Upper Canada, do not appear to have been made parties, otherwise than by a notice addressed to them set out in the judgment, and the allegations in the judgment, that the said Arthur J. Robertson, Mary Anne Robertson his wife, and the Bank of Upper Canada, "were duly notified according to law, as followeth: Upper Canada. Western District, to wit. In the Western District Court. To Arthur J. Robertson, of Inshes House,

Inverness-shire, in that part of Great Britain called Scotland, Esquire, and Mary Anne his wife, and the President, Directors, and Company, of the Bank of Upper Canada, having their banking house at York, in the said Province, Greeting: Notice is hereby given, that Joseph Woods, of the township of Sandwich, in the Western District aforesaid, surviving devisee in trust, named in the last will and testament of James Woods, the elder, late of Sandwich aforesaid, Esquire, deceased, will at the next term of the said Western District Court, commencing on the 23rd day June now next, file his petition in said Court, and therein and thereby pray and demand that partition may be made according to the statute in such case made and provided, of and in the lands, tenements, and hereditaments following, that is to say: of and in lots numbered ten, thirteen and fourteen in the second concession, and lots numbered ten and fourteen in the third concession, west of the Communication road, in the township of Harwich, each of which said lots contains two hundred acres. Also, lot numbered twenty-three in the third, and lots numbered seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four, in the fifth concession, eastward of the Communication road, and reckoned on the eastern boundary of the township of Harwich from Lake Erie, each of which said last mentioned lots contain two hundred acres. And the said Joseph Woods, as devisee aforesaid, will then and there claim to have the one-half parts of said lands above mentioned in severalty, to himself and his heirs and assigns for ever, with the exception of the one-half parts of lots numbers seventeen and eighteen, in the fifth concession of Harwich, as above mentioned, which were heretofore granted and assigned by the said Joseph Woods, and one James Woods the younger, late of Sandwich, Esquire, deceased, to the President, Directors, and Company, of the Bank of Upper Canada, to whom the same belongs and appertains. At which day the said Arthur J. Robertson, and Mary Anne his wife, and the President, Directors, and Company of the said bank, and all others whom it may

concern, are hereby notified and required to shew sufficient reason, if any such there be, why such partition should not be made according to the statute in that behalf." This notice, as far as appears in evidence, is not dated.

The record of the judgment alleges that the said Arthur Robertson, and Mary Anne his wife, and the said President, Directors, and Company of the said bank, being so duly notified, came not on the day in the said notice specified according to the said statute, nor gave any sufficient reason why (*sic*) should not be made as aforesaid, nor appear to say anything in bar or preclusion of the said petition of the said Joseph Woods why such partition ought not to be made.

The petition itself sets forth, "That the said Joseph Woods, as surviving devisee of the last will and testament of James Woods the elder, and one Mary Anne Robertson, formerly Pattinson, daughter of Richard Pattinson, late of Sandwich aforesaid, Esquire, deceased, wife of Arthur J. Robertson, of Inshes House, Inverness-shire, in that part of Great Britain called Scotland, Esquire, held together and were seised in fee simple, and as tenants in common, of and in certain real estate," &c., describing it, and without setting out any further the nature of the petitioner's title, or in what manner his testator claimed the land.

By the partition the lots were not each divided, but some lots in their entirety were assigned to one party or the other, and lot No. 10, in the 2nd concession west of the Communication road, in the township of Harwich, the land in question, was assigned to said Joseph Woods.

Now, assuming that *Gough v. McBride* was well decided, and a memorial signed by the grantee is not, *per se*, evidence of the conveyance, in what respect have the circumstances above referred to strengthened or increased the force of the memorial? The memorial signed by Arthur J. Robertson, relating to other lots, does not refer to the deed from Margaret McGregor to James Woods. It simply admits or asserts that Joseph Woods conveyed the land therein mentioned to him, and I cannot see how that adds

force to the memorial simply because these lots are mentioned in that memorial.

The mortgage to the Bank of Upper Canada is also an assertion merely of Joseph Woods that he had the right to convey the lands therein mentioned, and is, as against the defendant or Arthur J. Robertson, no more evidence than the memorial itself.

Then, does the judgment of partition in the Western District Court add any force to the memorial? Assuming that that judgment is binding upon Arthur J. Robertson, how does it establish or prove a conveyance from Margaret McGregor to James Woods? Margaret McGregor's name is not mentioned in that judgment, and the petitioner simply claims a right to partition of a large quantity of land, as surviving devisee under the will of James Woods, without, as far as the petition or judgment is concerned, it appearing in what way James Woods made title to the land. The judgment, then, if binding, only determines as between the parties thereto, that Joseph Woods, in 1834, was entitled to the lot in question, not by virtue of a conveyance from Margaret McGregor, but as devisee under the will of James Woods. To hold that this judgment strengthened the evidence of the memorial itself, is to hold that Joseph Woods must have proved title in the District Court under the deed from Margaret McGregor, as to which there is no evidence whatever, unless we assume, because Margaret McGregor was one of the grantees of the Crown, and there is no evidence of her having parted with her estate, except by the deed sought to be established by the memorial, she must have conveyed by that deed. This seems to me to be arguing in a circle, and unless we can hold the memorial, *per se*, to establish the deed, the other circumstances add nothing to the weight of the evidence.

Then, it is proved that a person named Morris Small occupied the lot as early as the year 1834; that is, put up a small house and did some clearing. He was followed in occupation by one Thornton, who was succeeded by one Declute, who was succeeded by Donald Cameron in 1836;

and in 1837 this Donald Cameron, by writing, acknowledged that he went into possession and held the land under one Donald Grant, who was agent of Arthur J. Robertson. Thus, as early as 1837, less than three years after the proceedings in partition in the District Court, Robertson was asserting a title to the land totally at variance with the judgment in partition, if not with the right of Joseph Woods, as tenant in common.

By the then Act respecting partition, 2 Wm. IV., ch. 35, it is provided the petition shall set forth the nature of the title or claim of the demandant, the land of which partition is demanded, and also the name and place of residence of each joint tenant, co-partner, or tenant in common, with the demandant, if they shall be known; and if on examination it shall appear that the demandant has a good and legal right and title to any part or proportion of the estate, then the Court shall proceed, *at the Term in which such petition may be filed*, to order and direct a partition to be had and made, provided it shall appear that the notice required by the Act hath been sufficiently and legally given, otherwise the Court shall order and direct notice of such demand of partition to be given, either by publication in one or more newspapers printed in this province, when the parties concerned reside out of this Province, or by personal notice, to be served at least forty days before the ensuing Term, if the party or parties reside within the province; provided, that when the person or persons of whom partition is demanded reside out of this province, and have an agent or attorney residing within this province, personal notice of such demand or partition shall be given to such agent or attorney as is required in the case of resident proprietors."

From the exemplification of the record of proceedings in the District Court, it appears that Arthur J. Robertson, and Mary Anne his wife, were residents of Inverness-shire, Scotland, out of the province, and that judgment was not given in the Term when the petition was filed, which was in June Term, 1834; but it does not appear that any order

of the Court was made directing the service of notice of the demand of partition, as required by the Act, the allegation in the record being that Robertson, his wife, and the Bank of Upper Canada, were notified as followeth: (Then follows the form of notice, without any allegation of service, set out above.) But the notice is to appear in June Term, the same Term as the petition was presented, and at which judgment ought to have been given, unless a continuance was granted under section 3 of the Act. The judgment itself was not given till Term following.

Serious questions might be raised as to the validity of the partition, but the plaintiffs' title does not depend upon the validity of that proceeding, and it is not necessary to decide upon the validity or invalidity thereof. As against this defendant, who is in possession, the plaintiffs are bound to trace title from the Crown, or from some one who had the actual possession at the time of conveyance; and the fact that he has taken a conveyance from Arthur J. Robertson in no manner estops or prevents him from putting the plaintiffs to strict proof of his title.

Upon the question of title by possession, there is evidence that as early as 1834 there was a person in occupation of a part of the land. There had then been no division of the lot into halves, and the title under which Small, the first occupant, went on does not appear, nor does that of Thornton or Declute; so that the first positive evidence of any one in actual possession making claim to the whole lot is that furnished by the agreement in 1837 between Donald Cameron and Donald Grant, acting for Arthur J. Robertson.

This action was commenced on the 30th of June, 1876; so, to bar the grantee of the Crown, and those claiming under her, it would be necessary to shew forty years possession prior to that date, unless notice to her, or some one claiming under her, was had twenty years before that date, of such actual possession; or that the grantee had taken possession and discontinued it twenty years before that time. There is no evidence of notice of the possession in

any one having been actually had by the grantee, or any one claiming under her.

If the judgment in the partition proceedings is to be taken as establishing that the land was delivered to Joseph Woods literally, as stated, he was put in possession in 1834; and then a question may arise whether, being so put into possession, he was not in a different position from one having made a mere entry, which would not be sufficient to prevent the owner from setting up the want of notice of the possession as a bar to the statute running against him by virtue of section 3 of the Limitation Act, C. S. U. C., ch. 88, which provides: "When the grantee, his heirs or assigns, by themselves or their agents, have not taken *actual possession, by residing upon or cultivating some portion thereof*, and in case some other person not claiming to hold under such grantee has been in possession of such land, *such possession having been taken while the land was in a state of nature*, then, unless it can be shewn that such grantee, or such person claiming under him, while entitled to the lands, had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee, or any person claiming under him, to bring an action for the recovery of such land; but the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained."

My learned brothers take the view that there is no evidence of an actual occupation of any but a very small portion of the land before the year 1837, which would only be thirty-nine years before the commencement of the suit; and while I think there is some evidence that Donald Cameron entered in the spring of 1836, and that although only a small clearing round the house put up by Small had then been made, his entry was made in assertion of right to the whole, and would be a sufficient possession to bar the plaintiff, the witness who speaks of his entry, Jesse Tyrrell, is uncertain whether it was in the spring or fall of 1836. If in the fall, the forty years necessary to

bar the plaintiff had not elapsed when the suit was commenced; and I do not think I am at liberty, where there is a doubt as to the necessary time having elapsed, to resolve the doubt in favour of the bar and against the possessor of the paper title. I therefore feel constrained, with much reluctance, to concur in the conclusion arrived at by my learned brothers on that point. I am so reluctant because the plaintiffs, apart from the strict legal right they may have acquired, do not stand in a favourable light in reference to the transaction. They were aware of the occupation of the land when they bought. They sought out Mr. Woods, who did not pretend to have any interest in the land, and induced him to convey it and other land for the small sum of four hundred dollars, when, if he really owned these lands, they were worth to him more thousands than he was getting hundreds, and caused a false consideration to be inserted in the deed, which only professed to be a conveyance of an undivided moiety, though the parties then supposed it conveyed all the interest the grantee had in the land, against the plaintiff's now contention that he really owned the whole lot.

While, therefore, I feel that I cannot legally arrive at the conclusion the plaintiffs' claim is barred by the Statute of Limitations, I think I am bound to hold that they fail from the want of legal proof of the deed from Margaret McGregor to James Woods; because the authority of the cases cited in our Courts establishes distinctly the insufficiency of a memorial signed by the grantee, the possession not going in accordance with the deed, to prove the deed; and, also, since the Legislature has declared that the memorial, accompanied by possession, shall be evidence of the deed, it has impliedly declared that, not so accompanied, the memorial shall not be sufficient evidence thereof,—at least, it shews the Legislature did not intend to make it evidence *per se*.

I think, therefore, the rule to enter the verdict for the plaintiffs should be discharged.

Rule absolute.

REGINA V. BARNES.

Profanation of the Lord's Day—Illegality of Sunday concerts—Imp. Act 21 Geo. III. ch. 49.

The Imp. Act 21 Geo. 3, ch. 49, prohibiting amusements and entertainments on the Lord's Day, is in force in Ontario, and an application to quash a conviction thereunder for keeping a disorderly house known as the "Royal Opera House," opened and used for public entertainment and amusement on the Lord's Day, was therefore refused.

THE defendant was convicted by the police magistrate of the city of Toronto, for having been unlawfully the keeper, on Sunday, the 22nd day of February, 1880, of a certain disorderly house known as the "Royal Opera House," which was then unlawfully opened and used for public entertainment and amusement, and to which persons were then unlawfully admitted by the payment of money, and by tickets sold for money, against the form of the statute, &c., &c.

Mr. Draper, chief constable of the city of Toronto, was complainant, and the defendant was adjudged to forfeit and pay \$20, and \$2.85 costs, to be levied by distress, or in default thirty days imprisonment.

The conviction was removed by *certiorari* into this Court, and on 17th May, 1880, *Murphy* obtained a rule *nisi* to quash, on several grounds.

1. That the information was insufficient, and disclosed no offence.
2. That the conviction was bad in law.
3. That the conviction was bad on its face.
4. That it was not supported by the evidence, or by the admissions made.
5. That it disclosed no offence.
6. That there was no evidence to support it.
7. That the statute on which defendant was convicted was not in force in Ontario.
8. That there was no evidence to support said conviction against defendant.

From the evidence and admissions it appeared that a performance, called a Grand Sacred Concert, was held on

Sunday evening, in the Royal Opera House: that some sacred and secular songs were sung, admission being by ticket for money, open to all comers: that some hundreds were present; and that there were applause and encores.

A printed bill, was put in as follows:

ROYAL OPERA HOUSE.

6th Year.

Mr. M. KeroLessee.

Mr. Lucien BarnesManager.

Admission—25, 50, and 75 cents. Boxes, \$5.

Matinees, 25 and 50 cents.

Engagement Extraordinary of the Peerless American Prima
Donna Comedienne,

A L I C E O A T E S !

Supported by the

OATES' ENGLISH COMIC OPERA COMPANY,

Under the management of Mr. Sam. T. Jack.

G R A N D S A C R E D C O N C E R T !

Sunday, February 22.

PART I.

Non e' rer.....Mr. T. McDonald.

SongMiss Ella Caldwell.

Recitation—"The Vagabonds"Mr. C. A. Stedman.

L'EstasiAlice Oates.

Ave MarieMr. C. F. Lang.

SongMr. G. F. Hall.

Quartette ...Messrs. McDonald, Clare, Rochester, & Decker.

PART II.

Oh Tan DoreMiss Huemmel.

Budge.....Mr. Gus. F. Hall.

Ave MarieAlice Oates.

Duet.....Messrs. Lang & Hall.

FarewellMr. J. H. Merritt.

Trio—"Attila".....Alice Oates, Messrs. Lang & Hall.

Stage ManageressAlice Oates.

Musical Director.....Mr. Salvator Guerra.

General AgentMr. Chas. Melville.

Press AgentMr. Jas. C. Jack.

Assistant Agent.....Mr. Lee Townsend.

Assistant Stage Manager.....Mr. Robt. Delius.

Master of Properties.....Mr. E. S. Collins.

One Kero was the lessee, and defendant Barnes the manager at a salary. The Opera House was an ordinary theatre on week days, under the same management.

May 29, 1880, *Fenton*, county crown attorney, shewed cause. The Imperial Act, 21 Geo. III. ch. 49, was passed in 1781, and was introduced into Upper Canada by 40 Geo. III. ch 1, passed July 4th, 1800, which enacted that "the criminal law of England, as it stood on the 17th day of September, 1792, shall be and the same is hereby declared to be the criminal law of this Province." This latter statute, now Con. Stats. U. C. ch. 94, emphatically declares that the criminal law of England shall be the criminal law of this Province, and adopts it as the law, and not merely as a general principle or as the rule of decision as in case of controversies respecting property and civil rights, under 32 Geo. III. ch. 1, now Con. Stats. U. C. ch. 9, which introduced the English law of property and civil rights. This distinction is made in several cases in our Courts, one of the latest of which is *Whitby v. Liscombe*, (in Appeal), 23 Grant 1. The first reported decision under 31 Geo. III. ch. 49, was *Baxter v. Langley* 38 L. J. N. S. (M. C.) 1, decided on November 19th, 1868, about 87 years after the Act was passed. It was contended, on the argument, that the Act was obsolete, but the Court decided the contrary. The defendant, Langley, who appeared in person, was reported to have said, in argument, that the author of 21 Geo. III. ch. 49, was Bishop Porteous, who said, "It restrains no one from professing that mode of religion and joining in that form of public worship which his conscience best approves; it restrains no one from speaking, conversing, or writing on religious subjects; it imposes no other restraint than this, that no one shall either pay or be paid for talking blasphemy or profaneness in a public room on the Lord's day; it takes away, in short, no other liberty but the liberty of burlesquing Scripture, and making religion a public amusement and a public trade." The next case was *Terry v. Brighton Aquarium Co.*, L. R. 10 Q. B.

306, decided in April, 1875. It was held that a building consisting of chambers below the level of the ground and a terrace above, used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals, besides a reading-room, restaurant, and conservatories, open to the public on Sunday, on payment of sixpence, was a place of public amusement within the statute. A similar decision was given in *Warner v. Brighton Aquarium Co.*, L. R. 10 Ex. 291, in June, 1875, and in *Girdlestone v. Brighton Aquarium Co.*, L. L. 3 Ex. Div. 137, in March, 1878, which indicates that this Act is law in England still. It has been said that as our Lord's Day Act, (R. S. O. ch. 189), legislates respecting the profanation of the Lord's day, that the English Act is now superseded in this country; but this is manifestly erroneous, because our statute is not inconsistent with the English Act. Besides, our Lord's Day Act has a counterpart in the English Lord's Day Act of Charles, which existed side by side with 21 Geo. III., ch. 49, in England, and there is no reason why the latter should not exist side by side with our Lord's Day Act in Ontario. Several decisions in our Courts shew clearly that Imperial statutes introduced with the body of the English law into Canada remain in force, and are not repealed or superseded by subsequent Acts passed here: *Dunne v. O'Reilly*, 11 C. P. 404; *Reid v. Inglis*, 12 C. P. 195. The statute of Geo. III. was undoubtedly founded on the principles of Christianity; and after the decision in *Pringle v. Napanee*, 43 U. C. R. 285, decided in 1878, there can be no doubt but that Christianity is a part of the law of this Province. *Bishop's Criminal Law*, vol. 2, sec. 950, shews that the observance of the Lord's day is enforced in Pennsylvania, Arkansas, Indiana, California, Missouri, and New York, besides the New England States, and this great Jurist (Bishop) says, "The institution of the Sabbath as a day of rest from worldly labour, dear as it is to him who reveres its Divine origin, has to the true statesman and the jurist a significance of a different kind. It is the corner-stone of public morality and happiness, viewed merely as a matter

of civil regulation; and, though the law should not foster any particular sect of religion at the expense of the rest, or even at the expense of him who conscientiously rejects all the current forms of religion, still it should not cast off a good thing, beneficial to the entire community, simply because the majority of people believe it not only to be good, but to be sanctioned also by their religion." For an historical review and general information on the subject of Sunday laws, see Chambers's Encyclopædia, article "Sabbath"; *Paley's* Moral and Political Philosophy, chs. 6, 8; *Bishop's* Criminal Law, I. sec. 499, II. sec. 74.

McCarthy, Q.C., and *N. Murphy*, contra. The recital in 21 Geo. III., ch. 49, shews that it was intended to remedy mischiefs in the cities of London and Westminster, and being of limited application it was not introduced into Canada with the body of the English criminal law. The Act was passed owing to local religious disturbances in London and Westminster; and if the Court should hold it to be in force in Ontario, then they must hold that the penal laws against Roman Catholics are also in force here. Only such laws as are applicable to the condition of this colony when the English law was introduced, came into force in Canada: *Doe dem. Anderson v. Todd*, 2 U. C. R. 82. Sunday entertainments had no existence in the early history of this Province, and this Act, which is merely a metropolitan police regulation, is not to be considered as part of the English criminal law which the early provincial statute introduced into Upper Canada.

August 30, 1880. HAGARTY, C. J.—The police magistrate convicted, under 21 Geo. III. ch. 49, in a very well considered judgment.

The main question argued before us was, whether this Imperial statute, passed in 1781, 21 Geo. III., ch. 49, is in force in Ontario, and, as I understand, the opinion of the Court is desired apart from any technical question.

The case is of importance, in view of the many questions arising respecting the observance of Sunday.

I am not aware of any occasion on which this statute has been discussed in a Canadian Court.

Down to 8 Vic. ch. 45, (Canada), it seems to have been understood that the observance of Sunday was regulated by the Stat. 29 Car. 2, ch. 7.

This Act is declared to be "for the better observation and keeping holy the Lord's Day, commonly called Sunday," and enacts that all the laws in force for the observance of the Lord's Day and repairing to the Church thereon be carefully put in execution. It prohibits the exercise of ordinary callings, &c., works of necessity and charity excepted; each person offending over fourteen years old to pay 5s., and with various other penalties for breaches, and in some cases, in default of payment by distress or otherwise, the offender is to stand two hours in the public stocks. Prosecutions must be in ten days.

I have not found any express decision on this Act questioning its being in force.

In *Bethune v. Hamilton*, 6 O.S. 105, a contract for chartering a steamboat by plaintiff to defendant, made on a Sunday, was held by this Court not to be "a transaction in the ordinary calling of these parties, either in contemplation of the Stat. 29 Car. 2, ch. 7, or of any of the decisions which have taken place upon it."

21 Geo. III., ch. 49, (passed 1781,) is headed "for preventing certain abuses and profanation of the Lord's Day, called Sunday"; reciting, in substance, that certain houses, &c., in London or Westminster, or the neighbourhood, had been opened for public entertainment or amusement upon the Lord's Day, and, under pretence of enquiring into religious doctrines, and explaining texts of Holy Scripture, debates were held on the evening of the Lord's Day by persons unlearned and incompetent to explain the same, to the corruption of good morals and the great encouragement of irreligion and profanity.

The Act then goes on: "Be it enacted * * that * * any house, room, or other place which shall be opened or used for public entertainment or amusement, or

for publicly debating on any subject whatsoever, upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place, and the keeper of such house, room, or place, shall forfeit the sum of £200 for every day that such house, &c., shall be open or used as aforesaid on the Lord's Day, to such person as will sue for the same, and be otherwise punishable, as the law directs in the cases of disorderly houses; and the person managing or conducting such entertainment or amusement on the Lord's Day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting, &c., shall likewise forfeit £100 to such person as will sue, &c., and every door-keeper, servant, &c., &c., collecting, or delivering out tickets, &c., shall forfeit £50." Sec. 2 provides expressly for making liable any person having the care, government, and management of such place. Sec. 3 gives a penalty of £50 for any person advertising or printing, or publishing any advertisement of any such public entertainment or meeting.

In 1845 the Parliament of Canada passed 8 Vic. ch. 45, declaring that it was "expedient to enact a law against the profanation of the Lord's Day, commonly called Sunday, which day ought to be duly observed and kept holy."

Its operation is confined to Upper Canada, and Indians are excluded from it.

It prohibits selling or buying of goods or real estate, and the doing any worldly labour, business, or work of ordinary callings, (with certain exceptions, such as works of necessity and charity,) and tippling and drunkenness, brawling, &c., in public places, riots, and holding public political meetings, playing at skittles, foot-ball, racket, or other noisy game, racing, hunting, shooting, bathing in exposed places.

Section 2 makes void all sales, purchases, contracts, &c., made on that day. Section 3 provides penalties up to £10 &c., &c. Section 8 provides that offences must be prosecuted within a month.

This Act would seem substantially to cover all the ground of the statute of Charles, and to create new breaches of the law. But in terms it leaves untouched the subjects dealt with by the Act of 1781. The conviction before us must rest wholly on this latter Act.

It is not necessary to enquire whether the act complained of could be punishable as an exercise of an ordinary calling by the defendant on Sunday against the strong language of our own Act of 1845, as neither the evidence nor the conviction points thereto. If the Act of 1781 be in force, the conviction is we think fully warranted.

It is objected against it, 1st. That it is an Act limited in its operation by the words of the preamble, and pointed against a particular state of things of local and temporary character. This objection is fully met by the answer that the enacting words are clear and general, and in no way limited in their application.

The objection was taken in *Terry v. Brighton Aquarium Co.*, L. R. 10 Q. B. 306, on the Act now in question. Lord Blackburn replied, "It has been decided over and over again that the preamble of a statute cannot cut down the general words of the enacting part." See *Filliter v. Phippen*, 11 Q. B. 34, as to the general application of the Metropolitan Building Acts. *Baxter v. Langley*, L. R. 4 C. P. 21, on the statute before us, may be also referred to.

It is secondly urged that the Act is not here in force; that it is either of such a nature that it was not introduced as part of the English civil or criminal law, or that it is in effect superseded or repealed by our statute of 1845.

To take the last point first. It must be borne in mind that our Act does not deal specifically with this particular branch of Sunday profanation, nor does it in any way expressly repeal or affect to consolidate the existing law as to Sunday.

I do not think that we are warranted by the authorities in holding that because our Parliament legislates on a particular branch of criminal law it thereby impliedly repeals prior existing laws on the same subject; at all events, not

where there is no inconsistent enactment or provision on the same special point.

To accept the objection we must hold that when our Legislature passed an Act prohibiting the doing of various things on Sunday, it impliedly allowed the doing of other things previously prohibited.

In the absence of all authority the argument might sound very reasonable that when the Canadian Parliament passed a general law on such a subject, professing to provide against the profanation of this day, they intended their provision to comprise the whole legislation on the subject. I think our Courts have clearly taken a different view.

In *Reid v. Inglis*, 12 C. P. 195, Draper, C. J., says: "The Stat., 1 Wm. & Mary, ch. 18, sec. 18, enacts, that if any person shall wilfully, maliciously, and contemptuously come into any cathedral, or parish church, chapel, or other congregation by this Act permitted, and disquiet or disturb the same, he shall find two sureties in the sum of £50 each, and in default thereof be committed to prison till the next General or Quarter Sessions, and on conviction thereat shall suffer the penalty of £20.

"The Consolidated Statutes of Canada, ch. 92, section 18, enact that any person who wilfully disturbs, interrupts, or disquiets any assemblage of persons met for religious worship, by profane discourse, by rude or indecent behaviour, &c., shall, upon a conviction before a Justice of the Peace, * * * forfeit and pay such sum of money, not exceeding \$20, as the Justice may think fit, and costs.

"I see no reason for holding that the former of these enactments is not in force in Upper Canada, or that it has been superseded by the latter, so that a person who wilfully disturbed a congregation lawfully assembled for religious worship might not be indicted."

In *Dunne v. O'Reilly*, 11 C. P. 406, the same learned Chief Justice says, "All parties seem to have overlooked the Statute 22 George II., ch. 46, which, together with enactments respecting exactions of the occupiers of locks and rivers upon the Thames, for regulating the assize of

bread, for preventing the distemper spreading among horned cattle, makes regulations in respect to attorneys and solicitors. This Act, though repealed in England, by 6 & 7 Vic. ch. 73, continues in force in this Province."

Section 11 of this Act is to prevent any attorney acting as agent for any unqualified person, or permitting his name to be made use of for the account or profit of any unqualified person, &c.

Section 17 of Consol. Stat. U. C. ch. 35, (the Attorneys' Act,) is almost to the same effect; but the Imperial Act is wider in its application.

In *Cronyn v. Widder*, 16 U. C. R. 360, it was held that 12 Geo. II., ch. 28, against lotteries, was in force in Upper Canada. Sir John Robinson discusses the question, and mentions cases in which the 13 Geo. II., ch. 19, against horse-racing, was held also to be in force here.

He notices that our Legislature had recently passed an Act against lotteries, 19 Vic. ch. 49, but subsequent to the transaction before the Court. It was argued that the Canadian Act declared that it was desirable that the practice of selling land or goods by lot or chance be prohibited by law, and such sales be declared void, and therefore it was to be assumed that it was not previously unlawful. The Court refused to adopt that view. He also refers to the Statute 11 Geo. IV., ch. 1, which provides that in all cases in which by the criminal law of England in force in this Province, fines or penalties on any offence are appropriated for the support of the poor or to any parochial or other purpose inapplicable to the existing state of things in Upper Canada, such fines, &c., should be paid to the treasurer of the district for district purposes.

He discusses the larger question of the applicability of such acts, adding, "When acts have been prohibited under a penalty, from their tendency to lead to vice and immorality, as in the instance of sabbath-breaking and gambling, the English statutes respecting them, which were in force in 1792, have been treated as being in force here."

Very soon after, *Marshall v. Platt* was decided, in 8 C.

P. 190, and my brother Cameron, as counsel for defendant, argued to the same effect as to these Lottery Acts.

Draper, C. J., says, "I should not feel at all prevented from holding that the Statute 12 Geo. II. was in force in Upper Canada under the first Act of the Legislature of this Province, introducing the law of England, by the language of the preamble to the late Act, which was enacting a Statute for the whole Province of Canada."

It remains to consider the larger question, as to whether this statute has been and is in force here.

I do not propose to travel over the ground covered by such cases as *Doe Anderson v. Todd*, 2 U. C. R. 82—familiar as it is to all—and the cases that have since occurred, such as that in Appeal, *Corporation of Whitby v. Liscombe*, 22 Grant 203. That the Mortmain Act, 9 Geo. II. ch 36, was and is in force in western Canada, has been fully established. The judgment in *Doe Anderson v. Todd* is chiefly rested upon the fact that local statutes recognized apparently the existence of the Mortmain Act; otherwise, it seems that the Court would have followed Sir Wm. Grant's judgment, in *Attorney General v. Stuart*, 2 Mer. 144, which applied to the Island of Grenada.

I think it right to say—with unfeigned respect for all this very high authority—that I should not hesitate to hold that this Mortmain Act was introduced into this Province by our Statute 32 Geo. III. ch. 1, as part of the general law of England, and that it is not necessary to depend on the recognition of subsequent local statutes to uphold its existence.

The Mortmain Act was to meet a general mischief. As has been said, "the Legislature blended the two inconveniences—the acts of languishing and dying persons, and the disherison of heirs." Lord Hardwicke's remarks in *Attorney-General v. Lord Weymouth*, Ambler, 20, as to the general mischief designed to be met by this Act, are worthy of perusal.

I fully share the opinion, on this head, of the late Chief Justice Draper, in *Corporation of Whitby v. Liscombe*, 23

Grant, pp. 13, 14, 16, and 17. The existing authorities are cited there.

Then, is the statute of 1781 of such a character as to be held introduced as part of the criminal law of England into Ontario? In my judgment it certainly is.

It is of general importance and bearing. It is expressly within Sir J. Robinson's language, already cited in *Cronyn v. Widder*, as to matters of "vice and immorality, as in the instance of sabbath-breaking and gambling."

In *Baldwin v. Roddy*, 3 O. S. 166, the majority of the Court held 19 Geo. III. ch. 70, was in force, allowing *certiorari* in certain cases. Sir J. Robinson says: "In every case of the kind the question whether a statute has force or not must rest on reasons and principles to be considered in reference to such statute in particular. I see no satisfactory reason on which we can reject this. It is true that the particular inducement to its passing, as set forth in the statute, does not apply; that may be said with respect to much of the statute law, civil and criminal, which we daily act upon. The Parliament * * * made a provision general in its nature, and expedient upon grounds of policy and convenience, which apply as much here as in England."

Shea v. Chout, 2 U. C. R. 211, may also be referred to; also *Wragg v. Jarvis*, 4 O. S. 320; *Regina v. Mercer*, 17 U. C. R. 618; *Regina v. McCormick*, 18 U. C. R. 133; *Hesketh v. Ward*, 17 C. P. 700. See, also, on the general law, *Uniacke v. Dickson*, James's Nova Scotia R. 289.

I think the Imperial Act of 1781 is in force, and the conviction is good.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

FORAN V. McINTYRE ET AL.

Timber licenses—Rights acquired by R. W. Co. before Confederation over Crown lands—Assignees of R. W. Co. not liable for trespass thereon.

Held, ARMOUR, J., dissenting, that the timber licenses, claimed by the plaintiff, as licensee of the Ontario Government, were subject to the right of the Canada Central Railway Company, acquired before Confederation, to construct their road across the Crown Lands, over which the licenses in question extended; and that the defendants, assignees of the railway company, were therefore not liable in trespass for entering upon and cutting timber on the said limits in prosecution of the work of building the said railway.

THE first count of the declaration was trespass, for breaking and entering certain lands of the plaintiff known as the plaintiff's timber limits (describing them), and for cutting down the timber thereon.

2nd count. Trespass for seizing, taking, and carrying away the plaintiff's timber.

3rd count. Trover, for the conversion of the plaintiff's timber.

4th and following, common counts.

Pleas—1st, To first count, not guilty. 2nd, to first count, timber limits not the lands of the plaintiff, as alleged. 3rd, to second count, not guilty. 4th, to second count, timber not plaintiff's. 5th, to third count, not guilty. 6th, to third count, timber not plaintiff's. 7th, to first, second, and third counts that the lands in the first count mentioned were what were known as public lands of Her Majesty, and that the Canada Central Railway Company, under and pursuant to the provisions of the statutes passed in that behalf, entered into a contract with Her Majesty to build a line of railway on and through the lands mentioned in the first count, and known as the western section of the Canada Central Railway, and pursuant to the terms of the said contract the said Canada Central Railway Company duly assigned to the defendants the said contract, and all the rights and privileges therein contained, and the defendants duly entered upon and commenced the work necessary to build

the said railway, and complete the said contract; and pursuant to the provisions of the statutes in such case made and provided, surveys and levels, together with a map or plan thereof, and book of reference, were taken and made and examined and certified to, and a duplicate thereof duly deposited, as by the statutes prescribed, and there was set forth in the said map or plan and book of reference a general description of the lands through which the said railway was to pass, and every thing necessary for the right understanding of said map or plan; and among other lands mentioned therein through which the said railway was to pass, was the land mentioned and referred to in the said first count; and that all the matters hereinbefore mentioned took place and were done prior to the granting of the license of the timber limits under which the plaintiff claimed the said limits, and the said license was granted subject to certain conditions therein set forth, among which was a condition that nothing therein contained should prevent any person or persons from taking standing timber of any kind within the limits embraced in such license for the making of roads or bridges or public works; and the defendants averred that the said railway was a road and public work within the meaning of the said condition, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the defendants in the prosecution of the said contract and the building of the said road to enter upon the said land, and cut, and fell, and remove and take away trees standing in the woods, lands, and forests where the said railway passed, and any timber which might be necessary or useful for the construction of the railway, and thereupon the said defendants entered upon the said lands, and cut down, seized, and took, and converted for the purposes of said railway, the said timber and trees in the said first, second, and third counts mentioned, the same being necessary and useful for the construction of the said railway, which were the alleged trespasses.

8th, to fourth count, never indebted. First replication.— Joinder of issue on all the pleas. Second replication to seventh plea, that the Canada Central Railway Company did not agree and contract with Her Majesty for the building of the said line of railway, as alleged. Third replication to seventh plea, that the Canada Central Railway Company did not assign to the defendants the contract with Her Majesty for the building of the said line of railway and all the rights and privileges therein contained, as alleged. Fourth replication to seventh plea, that the said railway was not nor is a road or public work within the meaning of the said condition, as alleged. Fifth replication to seventh plea, that the condition in the said license, that nothing therein contained should prevent any person from taking any standing timber of any kind within the limits embraced in said license for the making of roads or bridges, or for public works, was subject to the condition that such person should first obtain the authority of the Department of Crown Lands for the Province of Ontario so to do, and the defendants did not obtain the authority of the said Department of Crown Lands to enter upon the said lands and cut down, seize, and convert the said timber and trees in the first, second, and third counts mentioned before committing the said trespasses, or at any time before the commencement of this suit.

Rejoinder—joinder of issue on second, third, fourth, and fifth replications to seventh plea. Second rejoinder to fifth replication, that under and by virtue of the statutes by them pleaded in the said seventh plea, the Canada Central Railway Company and the defendants, as the assignees of the contract in the seventh plea mentioned, had full power and authority, before and at the time of the committing of the alleged trespasses, to enter upon the said lands, and to cut down, seize, take, and convert the said timber and trees for the purposes of the said line of railway, without the said authority of the Department of Crown Lands for the Province of Ontario, in the fifth replication mentioned. Surrejoinder—joinder of issue upon the second rejoinder.

The case was tried before Cameron, J., and a jury at the last Fall Assizes at Pembroke, when, after the evidence of *Alexander Russell*, the Crown Timber Agent, was given, it was agreed that a verdict should be entered for the plaintiff, subject to his right to recover under the facts and statutes appearing in the case of *Booth v. McIntyre et al.*, in the Court of Common Pleas (a), for one-third of the verdict in that case, and to the objection taken viz: that there was no license in existence at the time this suit was brought, the same not having been delivered to the plaintiff till the 20th October, 1879, though signed in June, without description, and the description differed from the former licenses: that the defendants were in possession at the time the alleged trespass and conversion took place.

The verdict was accordingly entered for the plaintiff for \$233.33 damages.

The facts sufficiently appear in the case in the Common Pleas of *Booth v. McIntyre et al.*, and in the judgment in this case.

In Michaelmas Term last, November 20th, 1879, J. K. Kerr, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, or to enter a verdict for the defendants pursuant to the Common Law Procedure Act, or for a new trial, on the ground that the verdict was contrary to law and evidence, and on the ground that the plaintiff failed to establish his title to the lands, timber limits, timber and property, in respect of which this action was brought, and that the plaintiff was not shewn to have been in possession of the timber limits from which the timber in question was cut, at the time of the alleged trespasses, and that the evidence established the right of the defendant to enter upon the said timber limits and cut the said timber; or to reduce the verdict to the amount of the value of the trees cut outside of the line of Railway, and 99 feet on each side of the roadway, pursuant to leave reserved.

(a) 31 C. P. 183.

December 4th, 1879. *Bethune*, Q. C., shewed cause. Foran's limits were formerly Doran's, which expired in 1875, 6, 7. The license of 24th June, 1878, is not a renewal, and that could not operate except from its issue, and would not refer back to its date under the Order in Council. There was no license in fact, by reason of the misdescription. The license is subject to the rights of parties taking lumber for roads or bridges, or public works. Sec. 109 of the Consol. Act shews that the Provinces take the land of the Provinces subject to any trust. He cited *McMullen v. McDonell*, 26 U. C. R. 36; *Graham v. Heenan*, 20 C. P. 340; *Gilmour et al. v. Buck*, 24 C. P. 187; *McLaren v. Ryan*, 36 U. C. R. 307.

J. K. Kerr, Q. C., contra. Adding White is of no avail. There is no relation back to date. If there were a license defendants could enter under it to make roads, with the consent of the Commissioner of Crown Lands. 19 & 20 Vic. ch. 112, sec. 5, gave full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands lying between the same. He referred to *Canada Central R. W. Co. v. The Queen*, 20 Grant 273.

The Statutes cited are referred to in the judgments.

August 30th, 1880. HAGARTY, C.J.—We have had the advantage of reading the judgment of the Court of Common Pleas, in the case of *Booth v. McIntyre et al.* (a), involving almost the same questions as are here to be determined.

So far as the defence here is rested on the rights conferred on the Railway or Railroads of which the Canada Central Railroad Company is now the representative, we think the contention of defendants is proved.

The original Act of 1856, gave to the Lake Huron and Quebec Company, sec. 5, "full power to pass over any portion of the country between the points aforesaid, and to carry the said Railway through the Crown Lands lying between the same."

(a) 31 C. P. 183.

This right existed at the time of Confederation, and the Crown Lands of Ontario passed under the control of that Province, subject to such right.

An examination of all the statutes bearing thereon leads us to this conclusion.

The well considered case of the Petition of Right of this Company, decided by Mr. Justice Strong, *Canada Central Railway Company v. The Queen*, 20 Grant 273, and confirmed on rehearing by the full Court, reviewed all the Statutes down to Confederation, and decided in favour of the Company as to the important rights to public lands originally conferred on them, and sustained the view that the Crown Lands of Ontario remained subject thereto.

We think it must necessarily follow that the licenses claimed by plaintiff from the Ontario Government must be subject to the right of this Company to construct their road over the Crown Lands.

The decision in Chancery held that, as against the strenuous opposition of the Ontario Government, the original provisions, for granting specified portions of the Crown Lands along the line to the Company, must be held to be in force and binding on the Province.

With these decisions before us, we can have little difficulty in holding that the right of making the road across Crown Lands originally granted must be upheld, without any assent thereto on behalf of this Province.

This disposes of the main contention.

ARMOUR, J.—The plaintiff's claim to the timber for which this action was brought is based upon two licenses to cut timber regularly granted to him by one *Russell*, an agent under the Commissioner of Crown Lands authorized to that effect.

These licenses were numbered respectively : "No. 185 of Season 1878-9; No. 248 of Season 1876-7; and No. 186 of Season 1878-9; No. 249 of Season 1876-7; and were renewals of the said licences Nos. 248 and 249, and were dated on the 24th day of June, 1878, the day on which the

ground rent was paid, which entitled the plaintiff to them, and were actually signed by Mr. Russell on that day.

License No. 185 was to cut timber "upon the location described on the back hereof by me by metes and bounds, and road allowances, being a renewal for 1878-9 of license No. 248 of 1876-7, except as to lots sold or located, if any, which have by regulations ceased to be subject to timber license."

And license No. 186 was to cut timber "upon the location described on the back hereof by me by metes and bounds, and road allowances, being a renewal for 1878-9 of license No. 249 of 1876-7, except as to lots sold or located, if any, which have by regulations ceased to be subject to timber license."

Mr. Russell was unable to state when the descriptions by metes and bounds were endorsed upon these licenses with more exactness than that they were so endorsed during the winter of 1878-9.

These licenses, with the descriptions endorsed, were handed to the plaintiff on October 20th, 1879, they having expired on the 30th day of April, 1879.

These licenses were granted for the same lands as were described in the licenses Nos. 248 and 249, which Mr. Russell said he believed contained a good description of them, but the Commissioner of Crown Lands desired that they should be described in a different way, and the licenses were retained by him for the purpose of revising the description as desired by the Commissioner.

R. S. O., ch. 26, sec. 2, provides that "the said licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established; and such license shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof, whether such trees, timber, and lumber are cut by authority of the holder of such

license or by any other person with or without his consent, and such licenses shall entitle the holders thereof to seize in revendication or otherwise such trees, timber, or lumber, where the same are found in the possession of any unauthorized person, and also to institute any action or suit at law or equity against any wrongful possessor or trespassers, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any."

I am of opinion that the plaintiff, being entitled to the licenses on the 24th of June 1878, and Mr. *Russell* having on that day signed them, the plaintiff became on that day the holder of them within the meaning of this section, notwithstanding the fact that they were not handed to the plaintiff till the 20th of October, 1879, long after they had expired.

I am of opinion, also, that these licenses contained on their face, by reference to the previous licenses, a sufficient description of the lands in respect of which they issued, at all events, as against these defendants, without the description by metes and bounds afterwards endorsed upon them, and became valid to the plaintiff the moment they were signed, and before such description was so endorsed.

The object of the commissioner in desiring a revision of the description of the lands, in respect of which these licenses were issued, no doubt was to prevent the recurrence of questions as to boundary between adjoining licensees in that district, such as had arisen and had come before this Court in *Mackay v. Batson*, and not for the purpose of in any way depriving the licensee of any land in respect of which he was entitled to a license.

I think the plaintiff's claim to the timber sued for, based on these licenses, well made out.

The defence set up by the defendants must now be considered.

It is contended, in the first place, that the defendants were in the same position to set up the Acts of Parliament relating to the Canada Central Railway Company, as that company would be were they building the railway, and

that the Acts relating to the Canada Central Railway Company authorized the doing of the Acts complained of; and sec. 5 of 19 & 20 Vic. ch. 112, is relied on as the particular section giving that authority.

This Act is entitled "An Act to provide for and encourage the construction of a railway from Lake Huron to Quebec."

It incorporates certain persons therein named by the name of the Lake Huron, Ottawa, and Quebec Junction Railway Company.

It incorporates in its provisions the whole of The Railway Clauses Consolidation Act, 14 & 15 Vic. c. 51, except the 5th and 6th clauses thereof, except only in so far as they may be inconsistent with its express enactments, and it provides by its 5th section, the one relied on, that "The company, and their servants and agents, shall have full power and authority, under this Act, to lay out, construct, and complete a railway connection between the river Ottawa at Arnprior, or some place between Arnprior and Pembroke, and the waters of Lake Huron, at such point as may seem to the company best adapted to attain the objects mentioned in the preamble, with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands lying between the same."

After the passing of the Act 14 & 15 Vic. 51, and before the last-mentioned Act was passed, the Act 16 Vic. ch. 169, was passed, entitled, "An Act in addition to the General Railway Clauses Consolidation Act," sec. 8 of which is as follows: "And for avoiding doubts under the said Act, be it declared and enacted that it is not and shall not be lawful for any railway company to take possession of, use, or occupy any lands vested in Her Majesty without the consent of the Governor in Council, but that with the consent of the Governor in Council, it is and shall be lawful for any such railway company to take and appropriate for the use of their railway and works, but not to alienate, so much of the wild lands of the Crown not heretofore

granted or sold, lying on the route of the said railway, as may be necessary for their railway, as also so much of the land covered with the waters of any lake, river, stream, or of their respective beds, as may be found necessary for making, and completing, and using their said railway and works. * * Provided always, that nothing contained in this section shall be construed to limit or affect any power expressly given to any railway company by its special Act of Incorporation, or any special Act amending the same"; and section 10, of which is as follows: "And be it enacted that the provisions of this Act shall, from the passing thereof, apply to every railway made or to be made in this Province."

It is contended that sec. 5 of 19 & 20 Vic. ch. 112, is not controlled by the enactment 16 Vic. ch. 169, sec. 8, above set out, because the proviso therein prevents its being so controlled.

But I do not think that the power given by the 19 & 20 Vic. ch. 112, sec. 5, "to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands lying between the same," can be held, in the face of the 16 Vic. ch. 169, sec. 8, to be a power "to take possession of, use, and occupy any lands vested in Her Majesty without the consent of the Governor in Council"; nor that sec. 5 of 19 & 20 Vic. ch. 112, was, so far as the company by that Act incorporated was concerned, intended by the Legislature to be a repeal of 16 Vic. ch. 169, sec. 8. It might equally be argued that the power to "pass over any portion of country between the points aforesaid" authorized the railway company to take lands of individuals without compensation, and that the provisions of The Railway Clauses Consolidation Act as to compensation, incorporated with the Act 19 & 20 Vic. ch. 112, did not apply, as being inconsistent with this power.

By the 4th section of The Railway Clauses Consolidation Act, which is incorporated with the Act 19 & 20 Vic. ch. 112, it is provided that the power given by the special Act

to construct the railway, and to take lands for that purpose, shall be exercised subject to the provisions and restrictions contained in that Act, one of which is payment of compensation to the owners of land taken; and, although the power is given to the railway company "to pass over any portion of country between the points aforesaid," I think it is not inconsistent with this power that they should be obliged to pay compensation to owners of land taken by them in so passing over.

So I think the power "to carry the said railway through the Crown lands lying between the same," must be exercised subject to the 16 Vic. ch. 169, sec. 8, and that it is not inconsistent with such power that before the railway company takes possession, uses and occupies such Crown lands, they should first obtain the consent of the Governor in Council.

I think the power given by 19 & 20 Vic. ch. 112, sec. 5, is not within the proviso in 16 Vic. ch. 169, sec. 8.

I am of opinion, moreover, that 19 & 20 Vic. ch. 112, sec. 5, is in effect merely a description of the line of railway which the company were authorized to build, and as such is virtually repealed by 24 Vic. ch. 80, sec. 4.

It is to be observed, also, that by this latter Act all the provisions of the Railway Act are incorporated with this latter Act, save in so far as they may be inconsistent with any express enactment in this latter Act contained, and sections 4, 9, sub-sec. 3, 133, 136, 137, 138, and 139 of the Railway Act, are to be noted as bearing upon the question in hand.

By section 4 of the Act 35 Vic. ch. 68, D., entitled "An Act to amend the Act incorporating the Canada Central Railway Company," the provisions of the Railway Act, 1868, are thereby made applicable to and incorporated with that Act, and, inasmuch as the Railway Act of 1868 contains the prohibition against any railway company taking possession of, using or occupying any lands vested in Her Majesty without the consent of the Governor in Council, and contains nothing whatever preventing or interfering

with the application of that prohibition to the Canada Central Company, I think it can no longer be contended that they have any such power without such consent.

But if my view be erroneous, and they have such power without such consent, when did that power accrue to them? It is contended that it did so immediately upon the passing of the 19 & 20 Vic. ch. 112, and that at the time of Confederation it was an existing trust or interest in respect of "the Crown lands lying between the same," and that the Province of Ontario took such lands under the 109th section of the British North America Act, subject to such trust or interest. If this were so, the result would be that the Province of Ontario could only grant such lands subject to such trust or interest, and this railway company would be entitled to take "lands lying between the same," granted by the Province of Ontario since Confederation, without compensation to the grantees.

I do not think, with the greatest deference for the opinion of others, that the 5th section of the 19 & 20 Vic. ch. 112, created either a trust or interest within the meaning of section 109 of the British North America Act.

I do not see how such power could accrue to the railway company until they had filed their map or plan and book of reference under the Railway Act of 1868 (see section 8, sub-secs. 2 and 8), and this was not done until after the plaintiff had become the holder of the licenses under which he claims.

The evidence on that point is that of Mr. Worthington, one of the defendants, who says: "I saw this plan produced signed by T. Trudeau on the 15th of August, 1878. The plan was filed here in Pembroke on the 16th of August. The plan commences at Pembroke, and runs for twenty miles. This first plan passes a mile or two beyond the Chalk river: it goes into the Foran limit. This second plan follows the other and continues the line up to a little beyond Hart Lake. It is certified by T. Trudeau, Ottawa, 23rd July, 1879. This extends to about a mile of the Chalk River, three or four miles beyond the Booth limit.

It covers the whole of the Booth limit, and three or four miles beyond. These books produced are the books of reference, and correspond in dates to the plans above mentioned."

It will be seen from this evidence that the plan filed August 16, 1878, only goes into the plaintiff's limit, it is not stated how far, and it would appear therefore that some of the trespasses were committed before any plan was filed. How can such trespasses be justified by the defendants? But, assuming that the plans were filed before the trespasses were committed, would that justify the defendants in depriving the plaintiff of the property which he had previously acquired from the Crown by virtue of his licenses? I think it would not.

But, granting the power to the defendants under 19 & 20 Vic. ch. 112, sec. 5, to the full extent of that section, did that authorize the defendants, after the timber had been cut down and had become the goods and chattels of the plaintiff, to use it for their own purposes in constructing the railway? I cannot agree that it did.

It was further contended before us that, assuming the consent of the Governor in Council was necessary, it must be taken to have been given by the approval of the contract by the Governor in Council; but I do not think this contention can prevail.

The Government agreed to grant a bonus of \$12,000 a mile to the Canada Central Railway Company, to assist them in building their railway to unite with the Canada Pacific Railway at Lake Nipissing, but only on certain conditions, one of which was, that they should approve of the contract, for the obvious reason that they wanted the contract to be so drawn as to ensure the building of a railway of such a character as would justify their giving such a bonus.

There is nothing whatever in the contract shewing any intention that the defendants should take Crown lands without the consent of the Governor in Council; on the contrary, the defendants were by its terms to provide the

right of way. Nor is there anything whatever in the Orders in Council from which such consent can be inferred.

If such consent had been given, another question would have arisen as to the power in the Governor in Council to give such consent, which it is unnecessary now to discuss.

It was further contended that the following conditions, to which the plaintiff's licenses were subject, justified the defendants: 1st. That any person or persons may at all times make and use roads upon and travel over the ground hereby licensed. 2nd. That nothing shall prevent any person or persons from taking from the ground covered by this license standing timber of any kind (without compensation therefor) to be used for the making of roads or bridges, or for public works, the authority of the Department of Crown Lands having first been obtained.

It is sufficient to say that the railway being constructed by the defendants was not a road within the meaning of the first condition; and as to the second condition, that the authority of the Crown Lands Department never was obtained.

I think the verdict for the plaintiff should stand, and the rule be discharged.

CAMERON, J., concurred with HAGARTY, C. J.

Rule absolute.

RE GRAND JUNCTION RAILWAY COMPANY AND COUNTY OF PETERBOROUGH.

Grand Junction R. W. Co.—Grant of bonus to—Power of Dominion and Provincial Legislatures—Application for mandamus—Laches—Appointment of trustees.

The Grand Junction R. W. Co. was incorporated by 16 Vic. ch. 43, and by 18 Vic. ch. 33 was united with the Grand Trunk R. W. Co. By an Act of the Dominion, in 1870, the G. T. R. having declined the construction of the Grand Junction road, it was enacted that all the corporate rights &c., vested in the Grand Junction Co. by the 16 Vic., should be restored to and vested in certain persons named, who should exercise the same as fully as the parties originally named in the 16 Vic. could; and that the company should be called the Grand Junction R. W. Co. After this, in 1870, a by-law to aid the company by \$75,000 was introduced into the County Council of Peterborough, and approved of by vote of the rate-payers, but on account of certain irregularities the council refused to pass it. In 1871, by 34 Vic. ch. 48, the Legislature of Ontario made valid the by-law, and directed that the corporation should issue debentures as if the by-law had been proposed after said Act; and provided for the appointment of trustees to whom they should be delivered. In 1874, the same Legislature, reciting that the company had prayed to have all their Acts consolidated, enacted that all the rights, &c., intended to be vested in the company under the several Acts of the old Parliament of Canada, of the Dominion, and of Ontario, should be vested in the shareholders of the said company, under the name of the Grand Junction R. W. Co., and that the 16 Vic. and 33 Vic. should be repealed. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under the Act of 1871. In 1872 the council served formal notice on the R. W. Co. repudiating all liability under the by-law. Work had been commenced in 1872, and in 1876 the time for completing the R. W. was extended by an Ontario statute till 1881, no time for such completion having been fixed by the by-law. No sum for interest or sinking fund had been collected, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees.

Held, that whether the Dominion Act of 1870 was *ultra vires* or not, The Ontario statute of 1874 either created a new corporation or recognised and reorganized an existing body, which was entitled to the debentures, whether technically the same company as that in existence when the by-law was made valid or not.

Per CAMERON, J., *Quære*, the work being wholly within the Province, whether the Dominion Parliament could create the company by the Act of 1870, without expressly declaring the work to be one "for the general advantage of Canada or of two or more of the Provinces," under the B. N. A. Act, sec. 92, subsec. 10c.

Quære, also, whether that section relates only to public works to be undertaken at the public expense, or to works of a quasi private character, such as a railway to be constructed by a public company.

Quære, also, whether sub-sec. 11 of section 92 gives to the local Legislature power to create a corporation, as has been assumed, or only to

make a general law under which corporations with Provincial objects may be incorporated.

Held, also, that under the facts, which are more fully stated below, there had been no laches on the part of the company disentiitling them to the debentures.

The by-law provided that in the event of trustees being thereafter appointed by the Legislature for receiving the debentures, the warden, within six months after passing the by-law, should deliver the debentures to them. By the Act of 1871, whenever any municipality should grant a bonus to the company, the debentures might, at the option of the municipality, be delivered to three trustees, to be named as therein directed. *Per* HAGARTY, C. J., and ARMOUR, J., the debentures should be delivered to the trustees appointed under the statute. *Per* CAMERON, J., the Legislature had not appointed trustees within the meaning of the by-law, but had only provided the manner in which they might be appointed; and as there was under the terms of the by-law no default in delivering the debentures, there should be no mandamus.

This was an application for a mandamus.

The facts were as follow :—

In October, 1870, the Council of the County of Peterborough passed through the first and second readings, “A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the Peterborough and Haliburton Railway, and for the issuing of debentures therefor to the amount of \$100,000, to be given by way of bonus to the said Grand Junction Railway Company and the said the Peterborough and Haliburton Railway Company in the manner and proportion following, that is to say, \$75,000 to the Grand Junction Railway Company, and \$25,000 to the Peterborough and Haliburton Railway Company.” After the first publication of the proposed by-law several material changes were made in it, and the date of voting was changed from the 16th to the 23rd of November, without the by-law or the change of date being again submitted to the council. Out of over 3,000 freeholders entitled to vote 556 voted for the by-law and 460 against it. The council, in January following, declined, on account of the irregularities in the submission of the by-law, to give it a third reading, and it was never read a third time, passed or sealed as a by-law.

The Grand Junction Railway Company was incorporated under the Dominion Act of 1870, 33 Vic.ch. 53, which revived

the charter under the Act 16 Vic. ch. 43. This Act limited the time for the commencement of the railway to two years, and for the completion to Peterborough to six years from, the passage of the Act. By the Ontario Act, 1870-71, (34 Vic. ch. 48), entitled "An Act to enable the municipalities along the line of the Grand Junction Railway Company to grant aid thereto, and to legalize certain by-laws granting aid to the said company," it was, by section 2, amongst other things, enacted, "That a certain by-law intituled" as above, "and which was approved of by a majority of the duly qualified voters in the county of Peterborough, on the 23rd day of November, 1870, be and the same is hereby declared legal, valid and binding, as if the same had received the third reading of the County Council of the said county of Peterborough; the said by-laws are hereby declared legal, valid and binding upon the corporations respectively, and on all others whomsoever."

Section 6 provided that, "whenever any municipality shall grant a bonus to the said company * * the debentures therefor may, at the option of the said municipality, within six months after passing of the by-law authorizing the same, be delivered to three trustees to be named, one by the Lieutenant Governor in Council, one by the said company, and one by the heads of the municipalities granting such bonuses." This Act was passed without notice to the corporation of the county, who, during the following summer, unsuccessfully endeavoured to have it disallowed by the Governor-General, and in the ensuing session to obtain its repeal by the Legislature.

Section 8 of the by-law provided, "that in the event of any trustee or trustees being hereafter appointed by the Legislature for the receiving and holding of moneys or securities for moneys awarded by way of bonus towards the construction of the said Grand Junction Railway, the said Warden shall within six weeks after the final passage of this by-law, or within six weeks after the passing of such legislative enactment, whichever shall last occur, hand

over and deliver such debentures, to the said amount of \$75,000, to such trustee or trustees, to be by them held and paid over and delivered to the said company, in accordance with and subject to the provisoes and conditions of this by-law, and not otherwise." By the preceding section \$25,000 were to be paid to the company upon the road being completely graded from the eastern limit of the county to the town of Peterborough, and \$50,000 on the iron being laid. By section 10 the by-law was to be inoperative unless the construction of the railway within the county should be commenced before the 1st of May, 1872.

Just before the expiry of this time a formal commencement of the work was made, which the respondents alleged was not a *bonâ fide* commencement, but done merely to save the by-law. A small portion of the road was subsequently graded in the township of Ashphodel, within the county, and the right of way acquired through two or three lots, when the work was abandoned, and nothing more done until the year 1879. In the year 1872 the council, having obtained the opinion of the late Chief Justice Harrison, then practising at the bar, that the by-law was inoperative, served a notice upon the company repudiating all liability under the by-law.

No debentures were ever issued, and no sum for interest or sinking fund was collected in the county. No demand was made for the debentures, nor was any intimation given to the respondents, after the service of their notice upon the company, that the company intended to complete the road, or to hold the county liable for the debentures, until the month of March, 1879, when the secretary of the company wrote to the warden of the county informing him that E. W. Holton, Esq., Belleville, was chairman of the board of trustees, appointed some years ago by the government, the municipalities, and the company, in pursuance of the statute, to receive the debentures of the various municipalities granting aid to the company, and asking him to have the necessary debentures prepared and forwarded to Mr. Holton without delay. E. W. Holton subsequently

died, and one Anson G. Northup was appointed in his stead, under the provisions of the recent Act.

On the 21st of November, 1879, *Hector Cameron*, Q.C., obtained a rule *nisi* from Osler, J., sitting alone, for a mandamus for the issue and delivery of the debentures to the trustees.

The rule was enlarged before the full Court, and came on for argument in Hilary Term, and was again enlarged until this Term, when on

June 3rd, 1880, *Bethune*, Q. C., shewed cause. The Dominion Parliament had power to grant the charter. The only legal continuance of the power to construct the railway is with the Dominion Parliament. By the Statute of Ontario, 37 Vic. ch. 43, sec. 2, both the old Provincial and the Dominion Act are repealed, which could not be done. Sec. 6 provides for the appointment of trustees. It is clear from *The Stratford and Huron R. W. Co. and The Corporation of the County of Perth*, 38 U. C. R. 158, and from *Brooks v. The County of Haldimand*, 3 App. R. 73, that the relief by *mandamus* is to be placed on the same footing as that by specific performance: *Fry on Specific Performance*, 321. *The People v. Seneca Common Pleas*, 2 Wend. 265, shews that a *mandamus* will not be granted after a year. See also on this point *High on Extraordinary Remedies*, 196. By the by-law itself the work was to be begun in May, 1872. *The Stratford and Huron R. W. Co. v. The County of Perth* shews that there could be no commencement till the filing of map and plan. Then, they have not even yet, as the affidavits shew, the complete right of way. There was some work begun in April, 1872, and little or nothing done after the following summer. The Railway Acts require also that the maps and plans shall be deposited with the Clerk of the Peace before the railway can be proceeded with. He cited also *Luther v. Wood*, 19 Chy. R. 348; *Re Goodhue*, 19 Chy. R. 450, per Strong, J.; *Hardcastle on Statutes*, 240.

Blake, Q. C., and *Cameron*, Q. C., contra. The applicants

were not guilty of laches. All the circumstances of each case must be considered, and here they shew that there was none; and no one was damnified by the delay. Had it not been for the subsequent legislation the question could not have been raised by the railway. The ratepayers, past and present, must be bound by the liability. In *The Stratford and Huron R. W. Co. v. The County of Perth* the Court were equally divided as to granting a *mandamus*. In this case form was set aside, and witnesses were examined; so that the machinery was just as complete as in another case. *Mandamus* is not to be limited to cases in which specific performance will be granted. Courts of equity refuse the latter only when there has been lack of diligence, and send applicants to a Court of law where damages can be obtained, and they are consequently not remediless. Here, however, unless the relief by *mandamus* is granted no relief at all can be had either at law or in equity. In equity there would be no ground for resisting this contract. As to the question of *ultra vires*, though the plaintiffs are a Dominion Corporation, still by the Act of 1874 they were created an Ontario corporation. A Dominion corporation can get recognition by the Provincial Legislature. They referred to *Richmond v. North London R. W. Co.* L. R. 3 Chy. App. 679; *Re Hamilton and North Western R. W. Co. and the Municipal Council of Perth et al.*, 39 U. C. R. 93.

The several Statutes cited on either side are referred to in the judgments.

August 30th, 1880. HAGARTY, C. J.—I have given this case much anxious consideration, and have finally arrived at the conclusion that the Railway Company are entitled to the debentures in question.

I am always unwilling, unless the case peremptorily requires it, to pronounce upon the constitutionality of a statute either of the Dominion or Provincial Legislature.

It is not necessary here to decide whether the Dominion Act of 1870, passed partly for the purpose of disentangling,

as it were, this company from its contemplated amalgamation with the Grand Trunk—a Dominion undertaking—was *ultra* or *intra vires*. I express no opinion against its efficacy. I consider that in any event the Act of 1874, applied to an undertaking wholly within the Province, had the effect of creating a new corporation, if none such existed, or of recognizing and reorganizing an existing body.

The previous Act, passed 15th February, 1871, had expressly recognized the company as an existing corporation, legislated for it, and legalized this by-law.

A case decided in this Court about 1847 discusses the question of the Legislature's dealing with a railway company, which, on a literal construction of its charter, was extinct, and its privileges forfeited. Most important changes were made—in the language of the Court, “so extensive that it would scarcely be a greater alteration of the original design if the railroad stock had been allowed to be changed into canal stock”: *City of Toronto and Lake Huron R. W. Co. v. Crookshank*, 4 U. C. R. 309. I may also refer to *Smith v. Spencer*, 12 C. P. 277.

The original stockholders refused to pay the new company but were held liable under the words of the statute.

Sir J. Robinson, C. J., after discussing all the objections as to hardship, change of design, &c., says: “Considering the nature of the subject—one completely within the scope of the colonial Legislature—we have nothing to do but to ask ourselves what is the plain intent and meaning of the Act, and, having ascertained that, it will become our duty to give it effect.”

His observations, at p. 318, have an important bearing on our local Act of 1874 in reorganizing or reviving this company.

I think the meaning of the Legislature is clear, to hold the county of Peterborough liable to give their debentures under this by-law to the present railway company.

I have nothing to do with either the wisdom or the justice of such an enactment. If its provisions press un-

fairly on the ratepayers of the county, it may not, even now, be too late to ask for relief against the serious difficulties which may arise as to the repayment of principal, and arrears of interest on debentures issued at this late date on a by-law nearly ten years old, and which has remained unacted upon so long.

By the Act of 1871 the defendants were to issue the debentures and act thereon, as if the by-law had been proposed after the passing of that Act.

Sec. 6 provided for the appointment of trustees, to whom, in the option of the municipality, the debentures should be issued, one to be named by the Lieutenant-Governor in Council, one by the company, and one by the heads of municipalities granting the bonus, with provision for default of nominations and filling vacancies as they occur.

Sec. 8 of the by-law provided that in the event of trustees being hereafter appointed by the Legislature for receiving and holding moneys or securities, &c., the warden should, within six weeks after the formal passing of the by-law or Legislative enactment, deliver the debentures to such trustees, to be by them held and paid or delivered to the company in accordance with, and subject to, the provisions of this by-law, and not otherwise.

I think the debentures should have been delivered to the trustees appointed, and should now be so delivered.

I do not think that the appointment by the Legislature under this by-law should necessarily have been by naming certain individuals. I think that the trustees' appointment, in whatsoever way and by whatsoever machinery the Legislature chose to provide, is sufficient. If it were necessary to name certain parties as trustees it must be done either for the whole Province or there would have to be special legislation for each particular municipal bonus to railways; or, again, if individual nominations be essential, whenever a death or other vacancy occurred there would have to be fresh legislation, as the objection would equally apply to any delegation of appointment in such a contingency.

When delivered to trustees the debentures still remain subject to the conditions in the by-law.

I do not think we are called on to determine the difficulties that may probably occur as to the back interest, or the failure of the municipality to levy the annual amount for sinking fund and interest for so many years, now amounting to nearly the whole sum granted to the railway.

Mr. Blake, for the railway company, declared the willingness of the latter to accept debentures payable in twenty years from the present time, the county, of course, obtaining the necessary authority for their legal issue.

This seems, under the circumstances, by far the most just and proper arrangement to be arrived at, and we should gladly see it accomplished; but the defendants do not agree.

I think the rule must be absolute, with costs. Had the council acceded to the proposed arrangement we might have allowed a reasonable delay.

ARMOUR, J., concurred.

CAMERON, J.—The principal grounds of opposition to the right of the railway company to the relief sought, urged on behalf of the municipal corporation of the county of Peterborough, are, first, an alleged defective incorporation of the railway company; second, assuming the railway to be duly incorporated, the present is not the one to which the bonus was granted, but a new company; third, as to the interference of the Court by *mandamus*, the laches of the company, in not making application promptly upon notice of the repudiation by the county of Peterborough of any liability to issue debentures in accordance with the by-law.

As to the first ground, it appears that on the 10th of November, 1852, a company was incorporated, called the Grand Junction Railroad Company, by the Act 16 Vic. ch. 43, with power to construct a double or single iron railroad or way over any part of the country lying between Belleville and Peterborough, and thence from the town of Peterborough south-westerly to the city of Toronto, to in-

tersect the main trunk line of railway proposed to be constructed, and also from Peterborough aforesaid to some point west thereof on the preceding section to such place on Lake Huron as should be decided on by the company; provided always, the said company should first obtain the sanction and approval of the Government to the line selected by them for the location of the road.

The Act, by the second section, incorporated therein the following clauses of the Railway Clauses Consolidation Act, that is to say, the first, second, third, and fourth clauses, and the several clauses with respect to "Interpretation, incorporation, powers, plans and surveys, lands and their valuation, highways and bridges, fences, tolls, general meetings, directors, their election and duties, shares and their transfer, municipalities, shareholders, actions for indemnity, and fines and penalties and their prosecution, working of the railway, and general provisions," save in so far as they were expressly varied by any clause or provision in the Act contained.

By sec. 6 provisional directors were named, who were to hold office until their successors should be elected by the shareholders under the provisions of the Act. The provisional directors were empowered to open stock-books and make a call on the shares subscribed in such books, and call a meeting of the shareholders for the election of directors.

By sec. 117 of the Railway Clauses Consolidation Act, or sec. 22, sub-sec. 6, of 14 & 15 Vic. ch. 51, the Act then in force, it is enacted, if the construction of the railway be not commenced and ten per cent. of the capital be not expended thereon within three years after the passing of the special Act, or if the railway is not finished and put in operation in ten years from the passing of such special Act the *corporate* existence and powers of the company shall cease.

By the Act 18 Vic. ch. 33, the Grand Junction Railroad Company, with other railway companies, became united with the Grand Trunk Railway Company; and by sec. 5 of that Act the Governor-in-Council was empowered from time to time, upon such terms and conditions as he should

think fit, by Order-in-Council, a copy of which should be inserted in the *Canada Gazette*, to extend the period allowed by the several recited Acts for the completion of the railways and works thereby respectively authorized, for such further time as he should think fit; and might so extend such periods respectively, either as to the whole of the railway and works forming the Grand Trunk Railway of Canada, or as to so much thereof as should be specified in such order.

Nothing appears to have been done after this last Act in respect to the construction of the Grand Junction Railroad, as far as shewn by the material before the Court on this application, until after the passing of the British North America Act, when the Act of the Dominion Parliament, 33 Vic. ch. 53, was passed. By this Act it is recited that "by an Act of the late Province of Canada, passed in the 16th year of Her Majesty's reign, chaptered forty-three, intituled 'An Act to incorporate the Grand Junction Railroad Company,' certain persons therein named, with all such other persons or corporations as should become shareholders in such company as was therein mentioned, were ordained, constituted, and declared to be a body corporate and politic in fact by and under the name and style of the Grand Junction Railroad Company; and whereas, after the passing of the said Act, the said Grand Junction Railroad Company became amalgamated with the Grand Trunk Railway Company of Canada, with the view of securing the construction of the said Grand Junction Railroad under the auspices of the said Grand Trunk Railway Company, but the said Grand Trunk Railway Company, having declined the construction of the said Grand Junction Railroad, are willing and consenting to the charter of the said Grand Junction Railroad being reinvested in, and restored to, those persons and corporations now interested in the construction of the said Grand Junction Railroad; and whereas Alexander Robertson," and others named, "have petitioned, representing the foregoing facts, and have prayed that an Act may be passed

to revive the charter of the Grand Junction Railroad Company, and to place the said company in the same position as it held before its amalgamation with the Grand Trunk Railway Company of Canada, with power to make arrangements with the said Grand Trunk Railway Company of Canada for the use of part of their line, and for station and other accommodation at Belleville, and for other purposes connected with the same, and it is expedient to grant the prayer of the said petition."

The Act then provides: "All the corporate powers, rights, and privileges vested in the Grand Junction Railroad Company by virtue of the Act of the late Province of Canada, passed in the 16th year of Her Majesty's reign, chaptered forty-three, shall be, and the same are hereby restored to and invested in William Fabian Merrill," and other persons specially named, "and such other persons as shall become shareholders in the said company after the passing of this Act; and the said corporation in this Act named shall in all respects have and hold and exercise the said powers as fully as the parties originally named in the said Act, sixteenth Victoria, chapter forty-three, could and did hold and exercise the same; and all powers in respect of the subscribing for and holding of stock in the said company and all other powers whatsoever by the said Act granted to municipal corporations and others, shall be continued by this Act, and may be exercised as fully and effectually as they might have been under the said Act; and the name of the said company shall be the Grand Junction Railway Company."

By sec. 2 of the Act provisional directors are named in place of those in the original Act.

By sec. 8 the railway shall be commenced within two years and completed to Peterborough within six years; and the said company was empowered under the Act to lay out, construct, make, and finish an iron railway at their own costs and charges, on or over any part of the country lying between Belleville and Peterborough, and then to such point on the Georgian Bay as might be decided on by

the said company ; provided that such company should not have power to build or make such railway to the city of Toronto.

This was the position of the enactments respecting the Grand Junction Railway Company at the time the by-law in question was introduced into the council of the corporation of Peterborough and voted on by the rate-payers. Afterwards, on the 15th of February, 1871, the Act of the Legislature of Ontario, 34 Vic. ch. 48, was passed. This is intituled, "An Act to enable the municipalities along the line of the Grand Junction Railway Company to grant aid thereto, and to legalize certain by-laws granting aid to the said company."

By the second section of this Act the by-law in question was referred to, with other by-laws, and declared to be legal and binding upon the corporation of Peterborough, in the following language : "A certain by-law, intituled 'A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the Peterborough and Haliburton Railway, and for the issuing of debentures therefor to the amount of one hundred thousand dollars, to be given by way of bonus to the said Grand Junction Railway Company and the said Peterborough and Haliburton Railway Company, in the manner and proportion following, that is to say, seventy-five thousand dollars to the Grand Junction Railway Company, and twenty-five thousand dollars to the Peterborough and Haliburton Railway Company,' and which was approved of by a majority of the duly qualified voters in the county of Peterborough on the twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy, by (meaning *be*) and the same is hereby declared legal, valid, and binding, as if the same had received the third reading of the County Council of the said County of Peterborough ; the said by-laws," that is, the by-law in question and all other by-laws referred to in the Act, "are hereby declared legal, valid, and binding upon the corporation respectively, and on all others whomsoever ; and the

said several corporations above-mentioned shall, respectively, proceed to issue debentures, and act upon said by-laws, in all respects in the same manner as if the said by-laws respectively had been proposed after the passing of this Act."

By sec. 4 it is enacted, "The several municipal corporations along the line of the said proposed railway, and also any municipal corporation near to the said proposed line, may grant to the said railway company such sum of money or debentures as may by the said municipal corporations respectively be thought advisable, in the way of bonus or donation, to aid in the construction or equipment of the said railway, or for any of the works authorized under the *charter* of the said company to be undertaken. And it shall and may be lawful for the said company to accept of such bonus or donation, and to apply any such sums of money, or the proceeds of such debentures, to the purpose for which the same were granted."

It is clear from this enactment the Legislature of Ontario, having undoubted jurisdiction over the municipal corporation of the county of Peterborough, recognized the existence of a railway company, designated The Grand Junction Railway Company, and approved of the grant by the corporation of a bonus or donation to the company of the sum of \$75,000, to assist them in the construction of the railway. And whether the Parliament of Canada had power to pass the Act 33 Vic. ch. 53, or not, there was an association of persons designated the Grand Junction Railway Company, acting under the terms of the Act, which, if it did not create a valid corporation, contained the contract of association between the parties themselves, and so there was, at the time the by-law was read in council, voted upon by the duly qualified voters of the county, and rendered valid and binding upon the corporation of the county of Peterborough, a company, in fact, to which the by-law applied, capable of accepting and using the bonus of the county for the purpose for which the

same was intended. The objection, therefore, that the Grand Junction Railway Company was not, at the time the by-law became binding upon the corporation of the county of Peterborough, a valid corporation, is not entitled to prevail. The bonus, by the terms of the by-law, was not granted to a corporation *eo nomine*, but to a company which might or might not, according to the fact, be a corporation. If the Act of the Dominion Parliament was *intra vires*, it was a corporation; if not, it was a mere trading company.

In this view it becomes unnecessary to determine whether the Act of the Dominion Parliament did validly create the Grand Junction Railway Company a corporation or not. If it were necessary to decide the question I incline to the view of the learned counsel for the railway company, that the work being local and wholly within the Province of Ontario it would require the express declaration of the Dominion Parliament that it was a work "for the general advantage of Canada, or for the advantage of two or more of the Provinces," as provided by sec. c of sub-sec. 10 of sec. 92 of the British North America Act, to give jurisdiction to the Dominion Parliament to create the company, as by said sub-sec. 10 of sec. 92 the Provincial Legislature has power exclusively to make laws relating to local works and undertakings; and by sub-sec. 11, to the incorporation of companies with Provincial objects. The passing of the Act by the Dominion Parliament is not in itself such a declaration, for it is not improbable that in cases of doubt as to where the power really rests, the Dominion Parliament and the Local Legislature may both legislate on the same subject matter in order that the legislation may prove effectual, and it cannot be assumed that the mere fact of legislation by the Dominion Parliament in respect of a local work or the incorporation of a company with Provincial objects is a declaration by that Parliament that the work is "for the general advantage of Canada or for the advantage of two or more of the Provinces."

I assume the framers of sec. c. of sub-sec. 10, intended Parliament to declare in terms whether the work was for the advantage of Canada as a whole or for two or more of the Provinces, to be expressly designated. It may be that sub-sec. 10 has relation solely to works of a public character to be undertaken at the public expense, and not to works of a *quasi* private character, such as a railway to be constructed by a private company—in which view the Dominion Parliament would be unable to give itself jurisdiction, and the exclusive power of legislation would be confined to the Local Legislature under sub-sec. 11, if that section in fact gives power to create a corporation and is not confined to the making of a general law or laws under which companies with Provincial objects may be incorporated. Creating a corporation can hardly be said to be making a law, and the power given to the Local Legislatures, in respect to corporations, is to “make laws in relation to the incorporation of companies with Provincial objects.” The Legislatures of the several Provinces have assumed they had power to create corporations directly, and, though not by any means free from doubt, I shall assume that the proper construction of said sub-sec. 11 gives them that power.

This brings me to the second question: is the present Grand Junction Railway Company the company to which the bonus was granted? By ch. 43 of 37 Vic. O., passed 24th March, 1874, it is recited: “Whereas the Grand Junction Railway Company have, by their petition, prayed that all the Acts relating to said Company should be consolidated and amended and reduced into one Act.” And then it is enacted: Sec. 1—“All the rights, powers, and privileges intended to be vested in the Grand Junction Railway Company under the several statutes passed by the Parliament of the late Province of Canada, by the Parliament of the Dominion of Canada, and by the Legislature of the Province of Ontario, relating to said company, are hereby declared to be vested in the shareholders of the said Company under the name of ‘The Grand Junction Railway Company’.”

By sec. 2 the Act passed in the 16th year of the reign of Her Majesty and chaptered 43, and the Act passed in the 33rd year of the said reign and chaptered 53, were repealed; "but any Act or proceeding taken, done, or had under any of said statutes shall remain valid and binding as if the said Acts had not been repealed."

By sec. 3 "all the several provisions of the Railway Act, being ch. 66 of the Consolidated Statutes of the Province of Canada, and amendments thereto, shall apply to the said Company."

By sec. 4 "all contracts made heretofore by or with the said company, and which are now legal and subsisting, and all the rights and liabilities of and against the said company, shall continue in all respects binding upon and in favour of the said company, and shall not be altered or affected by any provision of this Act."

While technically the present company may or may not be the same company as that in existence at the time the by-law was rendered valid by the Legislature of Ontario, that being dependent upon their being the same body of shareholders, there can be no doubt the Legislature, by the Act last mentioned, intended to give to the company, then and now known as the Grand Junction Railway Company, all the powers and rights that belonged to the company intended to be revived or re-created by the Act 33 Vic. ch. 53; but by the terms of the Act the powers and rights are vested *in the shareholders* of the company under the name of the Grand Junction Railway Company; and if the shareholders were not the same persons who were shareholders at the time the by-law was made valid, and the company was not duly incorporated under the Dominion Act, the company now existing is not technically the same company or copartnership to which the bonus was granted. But it would be refining too much and clearly frustrating the intention of the Provincial Legislature to give weight to this objection. The bonus was granted to the Grand Junction Railway Company. That company prayed, by its petition

to the Legislature, that all the powers of the company, under the several acts relating thereto, might be vested in the shareholders of the company under the name of the Grand Junction Railway Company, and they were so vested, and there is no pretence for holding that there are two companies so called in existence. The present company has been performing the work to aid which the bonus was intended, and unless precluded under the third objection of laches, or on some other ground not urged, is entitled to obtain the debentures.

This brings up the consideration of the question of laches. The by-law came into operation on the 16th of December, 1870, by virtue of its terms, and the Act 34 Vic. ch. 48, O., passed 15th February, 1871. It was therein provided that the warden should deliver \$75,000 of debentures to the company, or whomsoever should be appointed by them to receive the same, in manner following:—\$25,000 as soon as the railway should be graded from the eastern limit of the county to the town of Peterborough, and the remaining \$50,000 as soon as the iron should be completely laid from said eastern limit to the town of Peterborough, on condition of the railway following a named route. If trustees were appointed by the Legislature the warden should, within six weeks from the passing of the by-law, or within six weeks after the appointment by the Legislature, deliver the debentures to such trustees, and unless the construction in the county of Peterborough should be commenced by the 1st of May, 1872, the by-law, so far as providing for the issuing of the said debentures, should become null and void.

By sec. 6 of the Act 34 Vic. ch. 48, the Act making the by-law valid, “Whenever any municipality * * shall grant a bonus to aid the said company in the making, equipping, and completion of the said railway, the debentures therefor may, *at the option of the said municipality*, within six months after passing of the by-law authorizing the same, be delivered to three trustees, to be named, one by the Lieutenant-Governor in Council, one

by the said company, and one by the heads of the municipalities granting such bonuses, or a majority of them, who shall attend a meeting for that purpose, to be held at such time and place as the said company may appoint for that purpose, notice of which shall be sent to each reeve, mayor, or warden, by mail, at least fourteen days before the day appointed, all of the trustees to be residents of the Province of Ontario; provided, that if the said reeve, mayor, or warden shall refuse or neglect to name such trustee, or if the Lieutenant-Governor in Council shall neglect or refuse to name such trustee within one month after notice in writing to him of the appointment of the other trustees, the company shall be at liberty to name such other trustee or other trustees" Under this provision trustees were appointed.

In March, 1871, the company notified the council to send the debentures to the trustees so appointed. In June, 1872, the council having received the legal opinion of the late Chief Justice of this Court, then at the bar, that they were no longer bound, notified the company that the by-law was effete, and they would resist all actions, &c., respecting the debentures.

In 1872, and before the 1st of May, work was commenced in the county of Peterborough, and about four miles made ready for the ties, when the work was suspended, owing, as alleged by the company, to the contractor failing to perform his contract. A large amount of work was afterwards done on other parts of the line.

In 1879 the company again applied to the council of the county of Peterborough for the debentures, and in November last made this application.

In February, 1876, the Legislature of Ontario passed an Act—39 Vic. ch. 71—extending the time for completion of the railway till the 1st of May, 1881; and by sec. 2 "the several by-laws passed by the several municipalities on the line of said proposed railway granting aid by way of bonus to the said company, and which have now lapsed, shall stand and have the same effect as if the time in this Act fixed

for the completion of said railway had been in the Acts now in force respecting said company named and fixed as the time for the completion of the said company's railway, and that none of said by-laws shall lapse by reason of the said extension of time, or the said railway not being completed within the time heretofore fixed for the completion of the same."

There was no time fixed in the by-law for the completion of the work, and the time fixed in the Dominion Act, 33 Vic. ch. 53, had not expired at the time this later Act was passed. The work is not yet sufficiently advanced to entitle the company to the debentures under the terms of the by-law, or to the proceeds, had the debentures been placed in the hands of trustees.

I am, therefore, of opinion there has been no laches to disentitle the company, if otherwise entitled, to the relief sought, whether the by-law must be regarded as a contract with the company, or an irrevocable gift. I regard it in the latter light rather than as a contract.

The Legislature having, for the encouragement of the building of railways for the public benefit, made provision that municipalities may aid by gift or bonus companies engaged in the construction of railways, after the approval of such aid by the vote of the qualified ratepayers, there can be no principle of law violated in compelling the municipality to carry into effect its own by-law, which, approved by the ratepayers, has passed beyond the power of the council to repeal, unless the company has done or failed to do something legally sufficient to disentitle it to the aid granted. Corporations should, by the terms or conditions of the grant, take care to protect themselves from loss or inconvenience. I think, therefore, that the present applicants are not, by reason of anything that has taken place, disentitled to the debentures, in accordance with the provisions of the by-law; but under these provisions they are not yet in a position to legally demand them. By the terms of the by-law, unless the Legislature appointed trustees to receive the debentures, or unless,

after the appointment of trustees, the corporation had exercised the option to deliver them to trustees under the Act, the Warden charged by the by-law with the duty of delivering them could not properly have delivered them to the company before the work had been performed, which by the by-law was a condition precedent to the delivery of the debentures. The railway had not, when this application was made, been graded to the town of Peterborough, to which extent it should have progressed before the company became entitled to any portion of the debentures.

The providing by the Legislature of the manner in which trustees may be appointed is not an appointment of trustees, and is not what the by-law provided for. Thus, trustees have not been appointed by the Legislature, nor has the corporation declared its option of delivering the debentures to the trustees appointed under the Act, and therefore the provision of the by-law for the delivery of the debentures, in case the Legislature did not appoint trustees, must prevail; and there being as yet no default or breach of duty on the part of the corporation, the rule for a *mandamus* should be discharged. It cannot, I think, be properly held that the provision for delivering the debentures to trustees, contained in the by-law, is in effect the exercise of the option given by the Act. The Act, though general in its terms, and applying to all municipalities that had granted or should grant a bonus to the company, makes express reference to the by-law in question; and the Legislature, it must be assumed, was aware of its provisions, and, with such knowledge, having given the option, it must be held it was the intention of the Legislature that the exercise of the option should take place after the passing of the Act. This strengthens the conclusion I have arrived at, that the Legislature considered the provision it was making in respect to the appointment of trustees was not that of the by-law, but other and different. I have not overlooked sec. 34 of ch. 43, 37 Vic., which makes it imperative on municipalities granting aid to rail-

ways to deliver the debentures therefor to trustees. That provision is not retrospective, and only applies to by-laws thereafter passed. The requirement that the debentures should be delivered to trustees within six months after the passing of the by-law could not be performed when, as in the present case, the by-law had been passed three years before, and shews it was intended to apply to by-laws passed under and after the Act.

Rule absolute.

MEMORANDA.

The following gentlemen were called to the Bar during this Term :

SAMUEL SKEFFINGTON ROBINSON, ALEXANDER GRANT, JOSEPH BOOMER WALKEM, EBENEZER FORSYTH BLACKIE JOHNSTONE, FRANK FITZGERALD, GEORGE A. F. ANDREWS, THOMAS STEWART, HENRY SCHUYLER LEMON, JAMES HENDERSON SCOTT, EUGENE DE BEAUVOIR CAREY, GIDEON DELAHAY, GERALD FRANCIS BROPHY, WILLIAM HENRY DEACON, ROBERT W. SHANNON, DANIEL MCLEAN, ARTHUR WILLIAM GUNDRY, JOHN NICHOLSON MUIR, JOHN BROWN McLAREN.

SITTINGS IN VACATION

AFTER EASTER TERM.

RE McLEAN AND CORPORATION OF THE TOWNSHIP OF OPS.

Drainage by-law—Publication of by-law—Appeal to Court of Revision and County Judge—Assessment of property—Interest of member of Council.

The omission of the words, “during the term next ensuing the final passing of the by-law,” from the notice with regard to a drainage by-law, under R. S. O., ch. 174, sec. 531, does not render the by-law invalid.

Where a by-law finally passed differs from that published only in respect of changes made in the assessment by the Court of Revision and County Judge, it is not necessary to publish such by-law again after such changes.

Where the engineer who made the assessment was not notified, and was not present at the Court of Revision, but was present on the appeals therefrom to the County Judge, which were taken by all who appealed to the Court of Revision, *Held*, no ground for setting aside the by-law.

The engineer is the proper party to make the assessment.

The principle on which the assessments were made, of assessing against a whole lot or part of a lot owned by one person, when only some of its acreage was benefited, the value of such benefit, *Held* not erroneous; and this would at all events have formed no ground for quashing the by-law, as this was a matter of which complaint might have been made to the Court of Revision.

It was alleged that one member of the Council was largely interested in the property to be drained by the by-law; but, *Held*, that no interest, which springs solely from his being a ratepayer, can disqualify a councillor or a member of a Court of Revision from performing his duties as such.

On appeal to the County Judge he reduced the assessment on one lot by only half, the owner, F., consenting, although according to the evidence it should have been further reduced. In distributing the amounts struck off among the other properties assessed he added nothing to the assessment of this lot, so fixed by consent, but he certified that the other owners were assessed for less than they would have been but for F.'s consent: *Held*, that sub-sec. 13, of sec. 530, had been practically complied with.

Hector Cameron, Q.C., obtained a rule *nisi* in single Court, on the 16th of January last, *Wilson*, C. J., presiding,

on behalf of James McLean, Thomas Newman, and Thomas Hazleton, calling upon the corporation of the township of Ops to shew cause why by-law No. 315 of that corporation, being a by-law for draining certain parts of the township, should not be quashed with costs, on the following grounds :

1. That no valid and sufficient publication of the said by-law, as required by the statute, and no legal notice of the time of the final passing thereof, was ever made or given.

2. That the by-law originally published, and as finally passed, was materially different.

3. That the only notice ever published stated that the final passing would take place on the 11th of August, 1879, but it was not passed on that day or on any day to which the meeting of the council, to have been held on that day, was adjourned for the purpose.

4. That the notice published was defective, and not according to the statute, and did not give to those interested the information required by the statute.

5. That the first and second reading of the by-law, and the session of the Court of Appeal to consider it, and the final passing of it, if such readings and passings ever took place, were all illegal and void, inasmuch as councillor Fitzpatrick, who was largely interested in the matter, took an active part and voted in all the said proceedings, which were carried by his vote and influence, and that such proceedings took place without a legally constituted council being present, or a quorum thereof, and that the said by-law was not in fact passed by the council, although so entered on the proceedings of the council.

6. That the council, at the Court of Revision, refused, by the casting vote of the said Fitzpatrick, to adjourn the consideration of the by-law until the engineer, who had prepared the said by-law and the report on it, was present, and that no notice of the appeals against the assessment was served on the said engineer, according to the statute, owing to his absence from the province.

7. That the said assessment was made by the engineer and the clerk, and not by the township assessors.

8. That the by-law, and assessment made thereunder, were unjust, unfair and illegal, and based on insufficient and unskilful surveys, and proceeded on an erroneous principle in charging whole parcels of lots instead of only those portions benefited, and charging all at an equal rate per acre, and in the several other matters shewn by the affidavits filed.

9. That the readjustment according to the order on appeal to the County Judge was illegal, in omitting lot twenty-two from the proportion of the increased burden caused by the reductions then made, and on the grounds shewn in the affidavits and papers filed.

In support of the application he filed a true copy of the by-law as provisionally adopted on the seventh day of July, A.D., 1879, which by-law was in the form prescribed by R. S. O., ch. 174, sec. 530. He also filed affidavits, alleging that this by-law, so provisionally adopted, was published once in every week for four weeks in a public newspaper published in Lindsay, the county town of that county, comprising the township of Ops, being the newspaper designated by the council of the corporation of Ops, as the newspaper in which such publication should take place: that to this by-law so published were appended the following notices :

"The above is a true copy of a by-law to be passed by the Municipal Council of the township of Ops, on Monday the eleventh day of August, A.D., 1879, at the hour of ten o'clock in the forenoon, at the council chamber in the town hall, Lindsay.

"J. O'LEARY, *Clerk.*"

"COURT OF REVISION."

"Take notice that a Court of Revision will be held by the Municipal Council of Ops on Monday, the fourth day of August, A.D., 1879, at ten o'clock in the forenoon, to hear any complaints against the assessment set forth in the above by-law.

"J. O'LEARY, *Clerk.*"

“PARTIES APPLYING TO QUASH.”

“Take notice, that any person or persons intending to apply to any of Her Majesty's Superior Courts at Toronto to quash the above by-law, or any portion thereof, must within ten days after the final passage of the by-law, notify the clerk and the reeve of the municipality of Ops of their intention so to apply, or, failing to do so, their application cannot be received by such Superior Courts, and the by-law will thereafter be in full force and effect.

“J. O'LEARY, *Clerk*”:

that the council of the township of Ops met as a Court of Revision in pursuance of the said notice on the 4th day of August, A.D. 1879, and after having taking the oath of office it was moved by Mr. Walker, and seconded by Mr. Fitzgerald, that the assessment of Mr. Thomas Fee's property, part of lot 22, in the 4th concession, be confirmed: that it was thereupon moved in amendment by Mr. Bryans, and seconded by Mr. Ray, that no action be taken by this Court in the absence of Mr. Deane, which amendment was lost, and the original motion carried: that it was thereupon moved by Mr. Bryans, and seconded by Mr. Ray, that the north half of lot No. 23, in the 4th concession, be left out of the drainage by-law, which was lost: that it was thereupon moved by Mr. Fitzgerald, and seconded by Mr. Walker, that an abatement of one half the amount be made on the assessment of the north half of lot No. 23, in the 4th concession, and that the by-law be amended accordingly, which was carried: that it was thereupon moved by Mr. Bryans, and seconded by Mr. Walker, that the assessment of the south half of lot No. 23, in the 4th concession, be reduced to \$5.41, annually, instead of \$8, and that the by-law be amended accordingly, which was carried: that it was thereupon moved by Mr. Ray, and seconded by Mr. Walker, that the assessment in by-law No. — do, as amended, be confirmed, which was carried: that those who appealed to the said Court in respect of their assessment were Thomas Fee, the owner of lot number twenty-two in the fourth concession; Eustace H. Hopkins, the

owner of the north half of lot number twenty-three, in the fourth concession, and Thomas Newman, the owner of the south half of lot number twenty-three and the north half of lot number twenty-one, in the fourth concession: that Mr. Deane, the provincial land surveyor, who examined the locality proposed to be drained, and made the assessment of the real property to be benefited by such drainage, was not notified to attend the said Court, nor did he attend thereat, but was, at the time of the sitting of the Court, absent in the Province of Manitoba, and that the resolution that no action be taken by the Court in the absence of Mr. Deane, was defeated by one vote, John Fitzpatrick voting against it: that Fee, Hopkins, Newman, and McLean, appealed to the County Court Judge from the Court of Revision: that the hearing of the appeals was adjourned by the Judge, in order that Deane might be present: that the Judge heard the evidence of Deane and others, and ordered that the appeal of Hopkins should be allowed, and that the assessment on his land and his land should be struck out of said by-law, and the by-law amended accordingly: that the appeal of Fee should be allowed, and that his assessment should be reduced from the sum of \$241 to the sum of \$120.50, and the by-law amended accordingly: that the appeal of Newman should be allowed in part, and that his assessment on the south half of lot number twenty-three, in the fourth concession, should be reduced from the sum of \$84.20 to the sum of \$22.50, and the by-law amended accordingly; and that his assessment on the north half of lot number twenty-one in the fourth concession should be confirmed: that the appeal of McLean never having been brought before the Court of Revision, could not be entertained; and he further ordered that the assessment of the lands mentioned in the by-law, except the said Hopkins's, being the north half of lot number twenty-three, in the fourth concession, and the said Fee's, being lot number twenty two, in the fourth concession, should be increased and varied in proportion to the sums then assessed thereon, so

as to include the sum of \$246.50 struck off the assessment of the lands of Hopkins, Fee, and Newman; so that the aggregate amount assessed should be the same as if there had been no appeals, and that the said by-law should be amended accordingly: that the by-law was amended as directed by the learned Judge, and was entered in the proceedings of the Council as finally passed on the 9th day of December, 1879, when it was not in fact passed at all: that the principle adopted by Deane in making his assessment was, that instead of assessing the particular land actually to be drained, he levied the assessment upon the whole fifty, one hundred, or two hundred acres, of which the drained or benefited portion formed a part; so that a two hundred acre lot, according to his assessment, would be assessed for the drainage of a paltry five acres in a remote corner of the lot, instead of the assessment being levied upon the five acres to be actually drained, and assessed each acre to be drained at a distance of only a few rods from the outlet of the drain as high as a like quantity of land two miles distant from the outlet: that John Fitzpatrick, one of the Council and Court of Revision, had been for years an active supporter and promoter of the proposed drainage: that he owned some of the land proposed to be drained: that his brother owned land proposed to be drained: that he had a large pecuniary interest in the proposed drainage: that he and his brother would have to pay from one-fourteenth to one-sixth of the assessment imposed by the by-law; and that by his personal influence, impelled by his pecuniary interest, he had procured the action of the Court of Revision and of the Council in respect of the assessment and by-law.

On the 14th of February, 1880, *J. K. Kerr*, Q.C., with him *Barron*, shewed cause, filing affidavits shewing the utility of the proposed drainage, the honesty of purpose of Fitzpatrick, the fact that, although the resolution passed at the Court of Revision respecting Hopkins was carried by a majority of one, Fitzpatrick voting for it, Hopkins's assess-

ment was altogether struck out by the County Judge, and that the by-law was unanimously passed on the 9th of December, 1879. They cited R. S. O. ch. 174, secs 529 *et seq.*; *In re Montgomery and The Corporation of Raleigh*, 21 C. P. 381; *In re Vashon and The Corporation of Hawkesbury*, 30 C. P. 194; *Re Baird and The Corporation of Almonte*, 41 U. C. R. 415.

Appelbe supported the rule, citing 42 Vic., ch. 31, sec. 27; *In re Corporation of Essex and Corporation of Rochester*, 42 U. C. R. 523; *Fisher's Digest*, 8214; *The Queen v. Meyer et al.*, L. R. 1 Q. B. Div. 173.

June 22, 1880. ARMOUR, J.—The affidavits filed leave no doubt upon my mind as to the great public utility of the proposed drainage, and as the statute providing for such drainage was passed for the general benefit of the public, I ought to support this by-law passed under its provisions for the purpose of benefiting the locality proposed to be drained, if it is legally possible to do so.

Section 531 of R. S. O., ch. 174, provides that, "Before the final passing of the by-law it shall be published once or oftener in every week, for four weeks, in such newspaper, published either within the municipality or in the county town, or in a public newspaper published in an adjoining local municipality, as the council may by resolution designate, together with a notice that any one intending to apply to have such by-law, or any part thereof, quashed, must, within ten days after the final passing thereof, serve a notice in writing upon the Reeve or other head officer, and upon the Clerk of the municipality, of his intention to make application for that purpose to one of her Majesty's Superior Courts of law at Toronto, during the Term next ensuing the final passing of the by-law."

The by-law in question, as provisionally adopted, was published on the 11th, 18th, and 25th days of July, and on the 1st day of August, A.D. 1879, in a public newspaper published in the county town of the county comprising the township of Ops, and I must assume, as the contrary is

not shewn, that such newspaper was designated for that purpose by resolution of the council of Ops.

The notice appended to and published with the by-law does not comply with the statute, as it leaves out the words, "during the term next ensuing the final passing of the by-law;" but I do not think that this omission can have the effect of rendering the publication of the by-law invalid: its only effect would be, in my opinion, to enable a party to move to quash the by-law, as in ordinary cases, without giving the notice required by the statute.

The applicants were not misled by the notice appended and published, for they gave a proper notice of their intention to apply within the time limited by, and as provided for by the statute.

Neither were the applicants misled or prejudiced by the notice appended to and published with the by-law, "that the above was a true copy of a by-law to be passed by the municipal council of the township of Ops, on Monday the 11th day of August, A.D. 1879," for this was a notice unnecessary to be given, and the applicants were all present opposing the final passing of the by-law on the 9th day of December, A.D. 1879; and this was the earliest day on which the council could have finally passed the by-law, for it was not till the 8th day of December, A.D. 1879, that the County Judge made his order respecting the appeals made to him from the Court of Revision.

The by-law, as finally passed, differed from the by-law published only in respect and by reason of the changes made in the assessment by the Court of Revision and the County Judge, and I think it clear that it was not necessary, as was contended, to publish the by-law again after such changes; and section 529, subsection 8, providing that "trial of such complaints shall be had in the first instance by and before the Court of Revision of the municipality in which the lands or roads lie, which Court the council shall from time to time, as occasion may require, hold on some day not earlier than twenty nor later than thirty days from the day on which the by-law was first

published, notice of which shall be published with the by-law during the first three weeks of its publication ;" and section 529, subsec. 13, providing that "In case, on every such complaint or appeal the assessment is varied in respect of the property, which is the subject of the complaint or appeal, the Court or Judge, as the case may be, shall vary *pro rata* the assessment of the said property, and of the other lands and roads benefited as aforesaid, without further notice to the persons interested therein, so that the aggregate amount assessed shall be the same as if there had been no appeal ;" establish the view I have taken to be correct, otherwise it would be impossible, unless indeed no person appealed against the assessment, ever to get such a by-law finally passed.

I do not think it a ground for setting aside this by-law, that the person who made the assessment was not notified of the time when the matter of the complaints against his assessment would be tried by the Court of Revision, or that he was not in fact present at such trial. The point that the applicants make is, that those who appealed to the Court of Revision against the assessment had not the benefit of the evidence of the person who made the assessment, but all who appealed to the Court of Revision appealed also therefrom to the County Judge, and they had on such latter appeal the benefit of the evidence of the person who made the assessment, who attended and was examined before the County Judge on such appeal ; and I do not think that any just cause of complaint can therefore be made by the applicants on this ground.

The objection that the assessment was made by the engineer and clerk, and not by the township assessors, is clearly untenable. The engineer is the proper party to make the assessment, as provided by R. S. O., ch. 174, sec. 529, and not the township assessors, and it is shewn that the engineer made it.

The principle adopted by the engineer, of assessing against a whole lot, or a part of a lot, owned by one person, when only some of its acreage was benefited, the value

of such benefit, was not, in my opinion, erroneous, nor was the assessing all the lands benefited at an equal rate per acre; but these were matters of which complaint might have been made to the Court of Revision, and which do not therefore afford ground for the interference of this Court.

The charges made, that the by-law and assessment were based upon insufficient and unskilful surveys, and that the by-law was not finally passed, are fully answered by the affidavits filed on behalf of the corporation.

The objection that the readjustment according to the order on appeal to the County Judge was illegal, in omitting lot twenty-two from the proportion of the increased burden caused by the reductions then made, is fully answered, in my opinion, by the County Judge, who certifies as follows: "That the appeal was before me of Thomas Fee and others from the decision of the Court of Revision: * * that upon his consent I fixed the assessment of Thomas Fee at one-half the sum assessed to him by the assessor, though upon the evidence I should have felt justified in reducing it still further: that in distributing the amounts struck off among the other properties assessed I did not add anything to Fee's assessment, as it had been fixed by consent, and as it stood it was for a larger sum than it would have been with his proportion added had I fixed the amounts upon the evidence without his consent. The result is, that the other parties are assessed for a smaller sum than they would have been but for Fee's consent."

I think that under these circumstances there was a practical compliance with sub-sec. 13 above set out.

The only remaining point to be adverted to is, the objection taken on the ground of the interest of John Fitzpatrick, one of the Council and one of the Court of Revision, which was composed of the whole Council.

The scheme of municipal government is, that the rate-payers in each municipality shall manage their own municipal affairs by a council elected from among themselves.

Each member of a Council is, in matters of taxation, therefore, pecuniarily interested in the subject matter with which he has to deal as such member, and each member of a Court of Revision is necessarily so, too.

In the case in hand, Fitzpatrick was pecuniarily interested as a ratepayer in the assessment imposed by the by-law, and so were all the ratepayers of the locality assessed. The other members of the Court of Revision were also pecuniarily interested in the same assessment, because what was thereby assessed against roads had to come out of the general funds of the municipality, and in this way Fitzpatrick would be interested in reducing the assessment against the lands and increasing it against the roads, while the other members of the Court of Revision would be interested in reducing the assessment against the roads and increasing it against the lands; and so in ordinary cases each member of a Court of Revision has a pecuniary interest in increasing the assessment of every other ratepayer, and thereby reducing his own, and against reducing the assessment of any other ratepayer, as he thereby increases his own.

The Legislature has, however, created this Court necessarily having this interest to decide upon complaints against the assessment of their fellow ratepayers, and I must hold, therefore, that no interest can disqualify a councillor, or a member of a Court of Revision, from performing his duties as such, that springs solely from his being a ratepayer in the municipality.

I cannot see that Fitzpatrick had any other interest but such as sprang solely from his being a ratepayer in the municipality to be benefited, and in the locality to be drained.

The Legislature, while it has constituted the Court of Revision of members interested as above stated, has provided an appeal from that Court to the county Judge, and in this case all who appealed to the Court of Revision appealed also to the county Judge, so that no harm accrued to them by reason of any of the Court of Revision having

been interested, and those who did not appeal to the Court of Revision cannot be heard to complain.

I think, therefore, that the objection raised on the ground of Fitzpatrick's interest cannot prevail, and that the rule should be discharged, with costs.

Rule discharged, with costs.

MEMORANDA.

During Trinity Term, the following gentlemen were called to the Bar :—

FREDERICK WRIGHT, EDWARD MORGAN, WILLIAM HENRY BEATTY, JOHN CANAVAN, EDWARD MAHON, ALEXANDER HENRY LEITH, JOHN JOSEPH BLAKE, CHARLES EDWARD HEWSON, WILLIAM HODGINS BIGGAR, WILLIAM HENRY POPE CLEMENT, SKEFFINGTON CONNOR ELLIOTT, PATRICK MCPHILLIPS, WILLIAM BRUCE ELLISON, JOHN STANLEY HOUGH, MICHAEL ANDREW MCHUGH, WILLIAM GEORGE EAKINS, JAMES ROLAND BROWN, RICHARD WORNALL WILSON, JAMES EDWARD LEES, JOSHUA ADAMS, ROBERT SINCLAIR GURD.

SITTINGS IN VACATION

AFTER TRINITY TERM.

KNOTT V. THE HAMILTON AND FLAMBOROUGH ROAD COMPANY.

*Road Co.'s Act (R. S. O. ch. 152)—Roads completed and tolls established—
Extensions—Right to collect tolls.*

The provisions of the "General Road Companies' Act" (R. S. O. ch. 152), respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon.

In this case, the extensions were new constructions within the city of Hamilton, and, measured separately, were less than two miles, though the distance of the original road and the extensions together much exceeded two miles: *Held*, that the defendants were entitled to exact toll therefor.

The toll gate had been maintained for nearly nine years on the portions of the road within the city of Hamilton: *Held*, that this did not preclude defendants from erecting a gate and taking toll there.

SPECIAL CASE.

The facts were briefly as follow: There was a road company formed in 1852 for the construction of a toll road from the east abutment of what was formerly known as the Desjardins Canal to the intersection of the road leading from Port Nelson. The place thus indicated was outside of the limits of the city of Hamilton. In 1853 another road company was formed for the construction of a toll road from a point called Upper Burlington Bridge to Freel's tavern. The place thus indicated was also outside of the city limits. In the same year, 1853, another road company was formed for the construction of a toll road from the same place of departure as the first company to the village of Carlisle. In the year 1867 these three companies became united under the name of the Hamilton and

Milton Road Company. At the time when these road companies were amalgamated, and for a number of years previously, the only access to the business portion of the city of Hamilton for any of these roads was across a high wooden bridge which had been made across the Desjardins Canal, where it intersects Burlington Heights, which is within the limits of the city of Hamilton. In the year 1869, in consequence of the dangerous state of the said bridge, an agreement was made, on 22nd June, 1869, between the city of Hamilton and the Hamilton and Milton Road Company, whereby, for the consideration therein mentioned, the company agreed "with the parties of the first part, (the city,) to build and construct, so soon as the same reasonably may or can be done, a good and sufficient bridge over the said canal and Burlington Heights, *and make proper approaches to said bridge on each side*, so as to be fit to be used for public travel, and to keep, maintain, and uphold the said bridge at their own expense in all time to come. And they the said parties of the second part further promise the said parties of the first part that they will also continue and extend their said toll roads from points at or near their present termini (these were, as already stated, outside the city limits) into the said city as far easterly as the easterly limit of what is known as the Ordnance lands, &c. And the said parties of the first part further covenant and agree with the parties of the second part that they will immediately pass a by-law permitting and consenting to the extension of the said toll roads of the parties of the second part into the city of Hamilton to the easterly limit of the said Ordnance lands," &c., &c. This agreement was dated 22nd June, 1869, but it appeared that in anticipation thereof the by-law had actually been passed on 7th June, 1869. By the by-law it was enacted, "That the said Hamilton and Milton Road Company be and they are hereby permitted and allowed to extend both their said toll roads from such points as the said company may select at or over the easterly termini of said respective roads southerly into the city of Hamilton,

as far as the easterly limit of what is known as the Ordinance lands on Burlington Heights aforesaid: provided always, that no toll shall be exacted from any parties residing on or owning property lying beyond the southerly end of the road and within the limits of the city in passing over the said bridge, either to or from the said property." In August or September, 1870, resolutions were duly passed and registered by the said company authorizing the extension of the respective roads to the point indicated by the said agreement and by-law. During the years 1869, 1870, and 1871, the company constructed the bridge and extensions, the land on which the extensions were made having been purchased by them.

Shortly after the completion of the works mentioned in the agreement, the company erected a toll gate on York street within the city of Hamilton, and collected tolls thereat for a period not exceeding three months, when the toll gate was removed, and the tolls again collected outside the city at the points where the respective roads had originally terminated, and the collection of toll was continued until the erection of a toll gate near York street, as hereinafter mentioned. The roads so constructed within the city of Hamilton were the only highways over which there was access to the city from the county on that side since the removal of the high level bridge which formed part of the original highway leading into the city from that quarter. In 1879, the defendants purchased the roads from The Hamilton and Milton Road Company, and shortly before the commencement of this suit erected a toll gate, within the limits of the city of Hamilton, on a portion of the road constructed by The Hamilton and Milton Road Company under the agreement hereinbefore mentioned, purchased by that company, and the defendants collected and claimed the right to collect toll at said gate from the plaintiff and others travelling over said road, which right the plaintiff disputed. It was admitted that the plaintiff was not within the proviso contained in the by-law. It was also admitted that the original toll gates had been removed

since the erection of the toll gate complained of, as appeared from the 10th admission.

The questions for the opinion of the Court were :

First—Do the provisions of “The Road Companies Act” respecting the extension of roads, apply to roads which have been constructed and completed and tolls established thereon?

Second—The extensions, being under construction within the City of Hamilton, in respect of which the defendants claim the right to take toll, and, measured separately, being less than two miles, can the defendants take toll therefor?

Third—No toll-gate having been maintained for a period of nearly nine years on the portions of road constructed by The Hamilton and Milton Road Company within the City of Hamilton, can the defendants now lawfully obstruct or interfere with the public use of these roads by the erection of a toll-gate thereon?

Fourth—Are the defendants entitled to erect and maintain the toll gate mentioned in the special case, and to collect toll thereat from the public travelling upon that portion of the road?

September 21, 1880. *MacKelcan*, Q. C., for the plaintiff. There can be no extension of a road after the line as originally projected has been completed: see per Gwynne, J., in *Yorkville, &c., Plank Road Co. v. Baldwin*, 20 C. P. 328. The sections of the statute 16 Vic. ch. 190, afterwards C. S. U. C. ch. 49, R. S. O. ch. 152, sec. 83, authorizing an extension, are commented upon there, taken in connection with other clauses, and it is shewn that the power to extend must be exercised before the completion of the road first contemplated. The expression, “projected,” in the 32nd section, shews that it is only a road about to be built which is meant, not one that has been completed. This extension, therefore, must be treated as a new and separate road, and, as it is less than two miles, no tolls can be collected. The defendants having allowed this part of the road to be used by the public for so long a period as nine

years without claiming tolls, have dedicated it, and are now precluded from establishing a gate there: *Trustees of Rugby Charity v. Merryweather*, 11 East 376; *Jarvis v. Dean*, 3 Bing. 447; *Rex v. Lloyd*, 1 Camp. 260; *Beveridge v. Creelman*, 42 U. C. R., at p. 33. And, lastly, the provision in the by-law, that a certain class shall be exempt, is in contravention of the statute, which contemplates a toll upon all persons equally and without discrimination; and the by-law is bad for this reason: per Gwynne, J., in *Yorkville, &c., Road Co. v. Baldwin*, 20 C. P. 336.

Robinson, Q. C., contra. The contention of the plaintiff is in effect that every extension is a new road, not an addition to the original road, and therefore that no extension for less than two miles will justify the company in taking any toll therefor; and that there can be no extension after the original road has been completed. This argument is supported, it is said, by the judgment of Gwynne, J., in *Yorkville, &c., Road Co. v. Baldwin*, 20 C. P. 328, but no decided opinion was expressed by the learned Judge, and the judgment of the Court was upon other grounds. Moreover, that case was under the 11th section of ch. 190 of 16 Vic., C. S. U. C. ch. 49, sec. 32, which read: "If at any time after the formation of any such company the directors be of opinion that it is desirable to widen, extend, or alter the projected line of road," &c. Afterwards that section was repealed by the 29 Vic., and the substituted clause was "So often as," &c. This seems clearly to shew that repeated extensions were contemplated, and it could not have been intended that they must all take place before the completion of the road originally projected. Nor is there any sound reason for such a construction. A road of ten miles long, of which eight and a-half miles were originally projected, and one and a half miles afterwards added by extension, should in justice be allowed to charge the same toll as if it were all constructed at once. As to the next objection—that the road having been built for ten years, and no toll taken thereon, the same has become dedicated to the public—there

can be no dedication in cases of this kind so as to abandon the right to tolls. The company are bound to repair, under severe penalties, and the tolls form the only fund for that purpose ; moreover, tolls have been taken for this portion, but the collection has been outside of the city. What the company is now doing is simply changing the position of the gates, which they may always do. Should the bridge go down the city would be the first to have the road indicted should they not rebuild. As to the next contention—that there is a clause in the by-law making provision that certain persons shall pass free, which makes it void—there is no law that compels the road company to charge all classes alike ; they are in the same position as a mercantile body, which may for certain reasons discriminate in their charges, keeping within the maximum prescribed, They may, for example, say to persons who could go by another road that they will reduce the tolls to them to secure their traffic. The law clearly contemplates that toll-gates may be erected within cities : *St. Catharines Road Co. v. Gardner*, 21 C. P. 190.

Mackelcan, Q.C., in reply. There is really no difference between 29 Vic ch. 36, sec. 4, and Consol. Stats. U. C., ch. 49, sec. 32, which would affect this case, or render the decision in *Yorkville Plank Road Co. v. Baldwin* inapplicable. The words, “so often after the formation of any such company,” and the words, “if at any time after,” &c., are synonymous expressions ; and if not so, there is no inference to be drawn from the use of the words, “so often,” that these provisions were intended to apply to roads already completed when the words, “if at any time,” formerly used, had no such application. The enactments requiring the road and every extension to be completed within two years from the incorporation of the company, if not more than five miles, and allowing one year only for each further distance of five miles, Consol. Stats. U. C., ch. 49, secs. 71 and 72, remained still in force, and this extension was not completed within any such period. As to the effect of user by the public for nine years without payment of toll, there is

no reason why a company should not be governed by the same rules of law as would apply to individuals. The owner of land, allowing a road to be used by the public through his property, without toll or interruption, for so long a time, could not afterwards impose a toll or obstruct the road, and the public would acquire the same rights against a company owning the land or road as against a private owner of the road.

September 28, 1880.—GALT, J.—As to the first question. The statute in force when these arrangements were made, was the 29 Vic. ch. 36, sec. 4, which appears to me to have been passed for the express purpose of authorizing the Directors of Road Companies as often as they thought fit to widen, extend, or alter the projected line of road, as the statute thereby amended might have been construed as authorizing one such construction only, the words being “if at any time.” But Mr. MacKelcan contended that, as the original roads had actually been completed, they could not be considered as “projected,” and therefore the statute did not apply to them. I am unable to accede to this argument. I understand the word “projected” to mean the work which was in contemplation when the company was originally formed, and that the Legislature intended to permit the directors at any time to extend the limits of the original road; otherwise, why did they use the word “extend,” which, *ex vi termini*, means to add to the original length. In my opinion, therefore, the first question must be answered in the affirmative.

As regards the second point. The roads now in question are not new or original roads, but are extensions, and the distance of the original road and the extension together would exceed two miles, and should be treated as a whole. The rate of toll is fixed by sec. 84 of R. S. O. ch. 152, and it is not alleged that a higher rate of toll is charged than is allowed by that section. I am therefore of opinion that this question must be answered in the affirmative, otherwise, as in a case like the present, where the extensions

were absolutely necessary, no company could be expected to make them, and the interests both of the public and the company would be very seriously affected.

Then, as to the third question. By the by-law, already referred to, the companies, which are now represented by the defendants, were expressly authorized to extend their "toll-road" to a point within the city limits, and to exact tolls from all persons except those mentioned in the proviso. By the 89th section, "Every such company may erect such number of toll-gates * * * along or across the said roads, and upon any other such work respectively," (this would in my opinion include the extensions,) "and fix, regulate, and collect such tolls, not exceeding the rates hereinbefore provided, to be collected at each gate, as they deem expedient, and may from time to time alter such tolls, toll-gates, &c., and may erect and maintain such toll-houses, toll-gates, &c., as are necessary and convenient for the due management of the business of the company."

The authority contained in this provision is express, that the company may at any time alter the position of their toll gates as to them may seem expedient or necessary; consequently this question must be answered in the affirmative.

For the reasons already given, the fourth question must also be answered in the affirmative.

There will therefore be a judgment of *nolle prosequi* entered up for the defendants, with costs of defence.

Judgment accordingly.

REGINA V. HOWARD.

Selling liquor without license—Liability of servant—R. S. O. ch. 181—Power of Provincial Legislature.

The defendant, a servant of one Ward, the keeper of an unlicensed tavern, was convicted of selling liquor in her master's absence.

CAMERON, J., *held* the conviction good, the case being undistinguishable in principle from *Regina v. Williams*, 42 U. C. R. 462, though he would otherwise have held the master alone responsible, under "The Liquor License Act," R. S. O. ch. 181.

Quære, per CAMERON, J., as to the power of the Local Legislature to limit, or authorize municipalities to limit, the number of licenses; and as to the effect of the decision of the Supreme Court in *City of Fredericton v. The Queen*, 3 Sup. Ct 505.

THE defendant, Agnes Howard, was on the 8th day of October, 1880, convicted before George Taylor Denison, Esquire, Police Magistrate in and for the city of Toronto, for that she, the said Agnes Howard, on the 8th day of September, in the year aforesaid, at and in the said city of Toronto, unlawfully did sell liquor without the license therefor by law required, Thomas Dexter, License Inspector in and for the said city, being the complainant. And the said Agnes Howard was for the said offence adjudged to pay the sum of \$20, to be paid and applied according to law, and also to pay to the said Thomas Dexter the sum of \$3.85 for his costs, and if the said several sums were not forthwith paid, the same were ordered to be levied by distress and sale of the goods and chattels of the said Agnes Howard, and in default of sufficient distress the said Agnes Howard was adjudged to be imprisoned in the common gaol of the said city, and there kept for the space of fifteen days. The evidence on the said charge was returned to the Court of Queen's Bench under a writ of *certiorari*, directed to the said Police Magistrate, together with the information; and upon such return,

Alexander MacNabb, for the defendant, moved to quash the conviction, on the ground that by the said evidence it appeared the defendant sold the said liquor

in the house of one W. H. Ward, and as the servant of and for the said Ward, and by his orders; and the selling of the said liquor was not a selling, either in fact or law, by the defendant, but by the said Ward, who was solely interested therein.

Fenton, County Crown Attorney, shewed cause in the first instance, and contended that the sale in law was a sale by the defendant, although the sale was for the benefit of Ward and in his house, and although the said Ward might also have been convicted for the said offence; and he relied upon *Regina v. Williams*, 42 U. C. R. 462, as an authority exactly in point.

November 16, 1880. CAMERON, J.—By section 51 of ch. 181, R. S. O., it is enacted: "Any person who sells or barter spirituous * * or manufactured liquors of any kind, or intoxicating liquors of any kind, without the license therefor by law required, * * shall for the first offence, on conviction thereof, forfeit and pay a penalty of not less than \$20, besides costs."

By section 83 it is enacted: "The occupant of any house, shop, room, or other place in which any sale, barter, or traffic of spirituous, fermented, or manufactured liquors * * has taken place, shall be personally liable to the penalty and punishments prescribed in the 51st and 52nd sections of this Act, * * notwithstanding such sale, barter, or traffic be made by some other person who cannot be proved to have so acted under or by the directions of such occupant; and proof of the fact of such sale, barter, or traffic * * by any person in the employ of such occupant, or who is suffered to be or remain in or upon the premises of such occupant, or to act in any way for such occupant, shall be conclusive evidence that such sale, barter, or traffic * * took place with the authority and by the direction of such occupant."

It is clear from this section the Legislature intended a sale, made by a servant, with or without the authority of the occupant of premises, to be considered a sale by the

occupant himself, and such occupant would be the person selling contrary to section 51, without the license required by law; and notwithstanding the provision in the Act 32 & 33 Vict. ch. 31. sec. 15, D., that every person who aids, abets, counsels, or procures the commission of any offence punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with or before or after the principal offender, and the general rule of law, that a person doing a criminal or illegal act cannot excuse himself by the command of a superior. I entertain very grave doubts as to the criminal or legal responsibility of the defendant. The effect of the License Act is to make, I think, the occupant of the house the principal offender; and if so, it changes the principle of the criminal law, which in the present case would make him an accessory before the fact, and the defendant, if liable at all, the principal. Moreover, the act of selling liquors is not *per se* an offence. It is only an offence by reason of the License Act, which is the Act of a Local Legislature, having no power to create a crime or criminal offence, but merely to impose a penalty on any one violating a statutory provision within the competency of such Local Legislature to enact, and the penalty can only be imposed upon those who answer the description of the offender in the statute itself. Assuming, then, that the statute is directed against the occupant of the house in which liquor is allowed to be sold without the license required by law, the servant or agent of such occupant would not answer the description of the offender—"a person selling without the license required by law."

The power of the Local Legislature under the British North America Act is to make laws relating to shop, saloon, tavern, auctioneer, or other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes. It is apparent from this provision that the license which Local Legislatures could require for the sale of liquor must have relation to a shop, saloon, or tavern; in other words, it must relate to some building as well as person,

and the provisions of the License Act do so relate. The Act provides for the licensing of taverns, saloons, shops, wholesale and retail—a tavern or saloon license authorizing the sale of liquor to be drunk on the premises; a shop license the sale in quantities not less than three half pints, to be drunk off the premises; and a wholesale license, the sale in quantities not less than five gallons, or a dozen bottles of three half pints each. I suppose there can be no doubt the Local Legislature could not prohibit the sale of liquors altogether, and it must, in making provision for the trafficking in liquor, pursue the powers given to it by the British North America Act, which are, as above set forth, to make laws relating to shop, saloon, and tavern licenses, and the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in section 92 of the Act. These provisions taken together seem to me to authorize Provincial Legislatures to pass laws requiring those dealing or trafficking in intoxicating liquors to take out a license and pay the fees required therefor, and to impose a penalty for selling such liquors without the license required by law, and paying the fees required therefor. Numerous convictions have, however, taken place under the law as it now stands, which have been upheld by the Courts of Queen's Bench and Common Pleas, and though the authority of these cases has been shaken, and, in my judgment, overruled in effect, by the decision of the Supreme Court in the case of the *City of Fredericton v. The Queen*, 3 Sup. Ct. R. 505, as that was not a decision in which the Liquor License Act was in question, I shall act upon the decisions of the Courts of Queen's Bench and Common Pleas till they are directly questioned and overruled in some proceeding had under the Act; and this I do in the present case the more readily as the constitutionality of the Act was not questioned in the argument, and the conviction was not attacked upon that ground, but upon the sole ground that the illegal act was

that of the defendant's master, and not hers; and if I were called upon to decide the question untrammelled by authority, I would hold the conviction bad, on the ground that the liquor was sold in the house of Ward, the master: that he was the person who should have had the license required by law; and the Liquor License Act having made him responsible for a sale in his house, and not his servant, he alone was and is responsible for the penalty; but I think the case of *Regina v. Williams*, 42 U. C. R. 462, is not distinguishable in principle from the present case, and must therefore refuse the defendant's motion to quash the conviction.

In the case of the *City of Fredericton v. The Queen*, 3 Sup. Ct. R. 505, above referred to, it was held the Canada Temperance Act, 1878, passed by the Dominion Parliament, authorizing, under the provisions therein contained, municipalities to prohibit the sale of intoxicating liquors within their jurisdiction, was an Act within the proper competence of that Parliament, as affecting and relating to trade and commerce. In delivering judgment, at page 542, Chief Justice Ritchie said: "When I had the honor to be Chief Justice of New Brunswick the question of the right of the Local Legislatures to pass laws prohibiting the sale or traffic in intoxicating liquors, came squarely before the Supreme Court of that Province, and that Court, in the case of *Regina v. The Justices of King's County*, 2 Pugs. 535, unanimously held that under the B. N. A. Act the Local Legislature had no power or authority to prohibit the sale of intoxicating liquors, and declared the Act passed with that intent *ultra vires*, and therefore unconstitutional. I have carefully reconsidered the judgment then pronounced, and I have not had the least doubt raised in my mind as to the soundness of the conclusion at which the Court arrived on that occasion. I then thought the Local Legislature had not the power to prohibit. I think the same now. I then thought the power belonged to the Dominion Parliament. I think so still."

Mr. Justice Gwynne, at page 572, said: "Turning to the

Act, we find it to be entitled an Act respecting the Traffic in Intoxicating Liquors. Its object, as stated in its preamble, is to promote temperance as a thing most desirable to be promoted in the Dominion; the means adopted in the Act for attaining this end consist in regulating and restraining the exercise of the trade or traffic in intoxicating liquors. Reading therefore the object of the Act to be as it was read in the Court below, namely, to endeavour to remove from the Dominion the national curse of intemperance, and observing that the means adopted to attain this end consist in the imposition of restraints on the mode of carrying on a particular trade, namely, the trade in intoxicating liquors, it cannot admit of a doubt that power to pass such an Act, *or any Act assuming to impose any restraint upon the traffic in intoxicating liquors*, or to impose any rules or regulations, *not merely for municipal or police purposes, to govern the persons engaged in that trade*, and assuming to prohibit the sale of liquors, except under and subject to the conditions imposed by the Act, is not only not given *exclusively*, but is not at all given to the Provincial Legislatures. The principle of *Regina v. Justices of King's County*, 2 Pugs. 535, decided, and properly so decided, in the Court from which this appeal comes, is equally applicable to exclude from the jurisdiction of the Local Legislatures all power to pass such an Act."

Reading this decision and the language of the learned Judges concurring therein, together with section 92, subsections 9 and 15, of the British North America Act, it would seem impossible to hold an Act passed by a Provincial Legislature limiting the number of licenses to be issued in the Province, or leaving it to any municipality or body, or number of persons, to limit the number of persons or places who may sell or wherein liquor may be sold, is not *ultra vires*. The decision shows the power to deal with or modify the traffic in intoxicating liquors rests with the Parliament of the Dominion; and the British North America Act shows the power of the Local Legislature is to make laws relating to shop, saloon, and tavern licenses,

in order to the raising of revenue, and the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation thereto. The true meaning of this provision is, that the Local Legislature may pass a law requiring every one engaged in the traffic of intoxicating liquors to take out a license and pay the fee required therefor, and to impose a penalty on those who neglect so to do. Clause 51, standing solely in connection with the provisions fixing the sum required to be paid for a license, and requiring a license to be taken out, might very well be held to impose a penalty for not taking out a license; but when it is connected with clauses limiting the number of licenses to be issued, the whole of the provisions become inoperative and void, as being beyond the powers of the Local Legislature, and imposing a restraint upon the traffic in intoxicating liquors only imposable by the Dominion Parliament.

In re Slavin and the Corporation of Orillia, 36 U. C. R. 159, it was held by the Court of Queen's Bench that a by-law passed by the corporation of Orillia prohibiting the sale of vinous or spirituous liquors in shops and places other than of public entertainment, and that no licenses should be granted therefor within the village, was valid as being a matter of police or municipal regulation.

In the case of *Regina v. Belmont*, 35 U. C. R. 300, Mr. Justice Morrison, in delivering the judgment of the Court, said: "The power to pass by-laws regulating the houses or places to be licensed, in our judgment, means regulations in respect of the sale of spirituous liquors therein, the hours and time at which they may be sold or prohibited, and with reference to the accommodation of guests and in respect of gambling therein, and not allowing disorderly persons to frequent the premises." This, it seems to me, defines what is, in relation to the subject of traffic in liquors, a police or municipal regulation. But in view of the express provision of the British North America Act, giving to the Local Legislatures power to make laws relating to shop, saloon, tavern, and other licenses, for the

purpose of raising revenue, and municipal institutions, property and civil rights in the Province, the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province in relation to any matter coming within any of those classes of subjects; while to the Parliament of the Dominion has been given jurisdiction over—that is, power to make laws relating to—trade and commerce—the criminal law and procedure in criminal matters, I do not see how it can be said it was in contemplation of the Imperial Parliament that dealing in an extensive article of commerce could be prohibited as a police or municipal regulation. That it cannot be totally prohibited, the Supreme Court has determined; and if it cannot be totally prohibited by the power of the Local Legislature, I do not see on what principle it can be limited to one, ten, or a thousand, or any other number of persons, merely as a police or municipal regulation. Notwithstanding my own opinion, the matter is too important for me to assume the responsibility of quashing the conviction on my own unaided judgment, in the face of the decisions of Judges in whose judgment I should be disposed, from their great ability, to place more confidence than in my own, and which, though against the opinion I held when at the bar, I would not impugn to any extent, were it not for the judgment of the Supreme Court already cited.

Conviction affirmed.

IN THE COURT OF QUEEN'S BENCH.

Regulae Generales.

Easter Term, 43 Victoria.

On Saturday, the fifth day of June, A.D. 1880, a Rule of was made, dispensing with the sitting of the Court of Queen's Bench, during the time appointed for holding Trinity Term.

MICHAELMAS TERM, 44 VICTORIA, 1880.

From November 15th to December 10th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

BEAUMONT V. CRAMP ET AL.

Chattel mortgage—Renewal.

Kissock v. Jarvis, 9 C. P. 156, as to the necessity of the renewal of a chattel mortgage from year to year, approved of and followed, notwithstanding the subsequent legislation contained in R. S. O. c. 119.

INTERPLEADER issue, tried before Armour, J., at Toronto, at the Summer Assizes, 1880.

The facts were, that the plaintiff having lent one Jarvis \$1,200, took as security a chattel mortgage upon certain of his household furniture, made on the 18th March, 1876, and filed in the County Court Office for the County of York, on March 20th, 1876. The mortgage was first renewed March 17th, 1877, and again on March 18th, 1878; again March 17th, 1879; and for the last time, March 10th, 1880. Default having been made in payment of the mortgage, the plaintiff went into possession on the 3rd of April, 1880, and shortly afterwards on the same day the Sheriff of York seized under a writ of *fi. fa.* in his hands against the goods of the said Jarvis, which had been placed in his hands, at the suit of the above-named defendants,

on May 22nd, 1879. The plaintiff contended that the writ was not in the hands of the sheriff to be executed, but on this point the learned Judge withdrew the case from the jury.

The verdict was entered for the defendants, with leave to the plaintiff to move.

In Trinity Term, August 26th, 1880, *John T. Small* moved, before Wilson, C. J. C. P., sitting for the full Court, for a rule *nisi*, pursuant to leave reserved, to set aside the verdict for the defendant, and enter a verdict for the plaintiff, or for a new trial, upon the following grounds :

1. That the plaintiff's chattel mortgage was duly renewed within thirty days next preceding the expiration of one year from the filing thereof; and the statute in that behalf did not require any further or other renewals.

2. That the plaintiff was the first to take possession of the goods and chattels in question upon default being made in payment of the moneys secured by his mortgage, and was entitled to hold such possession against the defendants.

3. That, even if the second re-filing of the chattel mortgage in question was after the expiration of one year from the first re-filing, it was sufficient as against the defendants, because such re-filing was completed before the defendants' writ was placed in the hands of the sheriff.

4. That the plaintiff was entitled to a lien for \$775, the amount paid to the sheriff, at the time the chattel mortgage was given, to remove the writs in his hands against the said goods and chattels in a certain suit of *Ogilvie v. Jarvis*, and interest thereon from March 18th, 1876, the date of payment thereof.

5. That the defendants' writ was not in the hands of the sheriff to be executed.

On moving for the rule, *Small* contended that the case of *Kissock v. Jarvis*, 9 C. P. 156, requiring a renewal year by year, was no longer an authority; that it was decided under the old statute, and the Revised Statute, by providing for a means of registering a discharge, removed one of

the chief reasons for that decision : that the case of *Newell v. Warner*, 44 N. Y. Rep. 258, decided by the Court of Appeals for the State of New York, was exactly in point, and was decided upon a Statute similar to the Revised Statute, it being there held that a renewal was only necessary at the end of the first year. As to possession, he contended that the plaintiff's chattel mortgage was of course valid as between the plaintiff and the mortgagor, whether renewed or not, and the plaintiff by taking possession after default, as provided in his mortgage, perfected his title against all persons, whether creditors or subsequent purchasers : that the plaintiff was, in any event, entitled to a lien for \$775 paid to the sheriff, in order to remove the writ in his hands, in the suit of *Ogilvie v. Jarvis*, against the goods and chattels in question. He referred to *Trust and Loan v. Cuthbert*, 13 Gr. 412, and 14 Gr. 410.

August 22, 1880. WILSON, C. J.—I am of opinion that the case of *Kissock v. Jarvis*, 9 C. P. 156, is an express decision that the chattel mortgage must be renewed year by year: that it is binding upon me ; and I should have come to the like conclusion as well upon the Revised as upon the original Statute, notwithstanding the case of *Newell v. Warner*, 44 N. Y. Rep. 258, in which decision I by no means concur. I am of opinion the alleged seizure, relied upon, a half hour or so before the sheriff seized, was not a seizure which could validate the mortgage, or which was authorized by the mortgage ; and that the alleged lien, obtained by payment of executions against the debtor's goods, gave no right of possession of the goods as against the other creditors, as no possession was taken of the goods then, nor was it intended thereby to acquire any possession by such supposed lien. The executions were paid off preparatory to the completion of the mortgage, and so as to give the mortgagee a good title to the goods. I refuse the rule.

In Michaelmas Term, November 22, 1880, *Ferguson*, Q. C., moved to rehear the decision of Wilson, C. J., and contended that the Statute of Ontario, 1880, ch. 15, secs. 2 to 4, shewed that the copy referred to in section 10 of the Revised Statutes of Ontario, was only the copy originally filed, and not a copy filed on renewal.

November 23, 1880. HAGARTY, C. J.—I think we must consider the point as settled by *Kissock v. Jarvis*, which I think was rightly decided. Since that time the Revised Statute of Ontario, ch. 119, allows registration of discharge of such mortgages, and section 15 declares that where a mortgage has been renewed, the endorsement or entries of discharge need only be made upon the copy *filed upon the last renewal*. This seems evidently to contemplate more renewals than one, by the use of the term “last.” The Act of last Session, cited by Mr. Ferguson, has merely dispensed with filing a copy, which I think makes no difference. Besides, it does not take effect till October 1880, and it contains the same clause about the “last renewal.”

I see no ground to interfere on any other point.

ARMOUR and CAMERON, JJ., concurred.

Rule refused.

NICHOLSON V. PHENIX INSURANCE COMPANY.

Insurance—"Grocery"—Sale of liquor—Right to recover.

The plaintiff, describing himself in the application as a grocer, and his store as being used as a grocery, insured with defendants his stock of groceries and patent medicines therein, and without the knowledge or assent of the defendants habitually retailed liquor there; but the jury found that the risk was not thereby increased.

Held, that there was no misrepresentation or concealment of a material fact; that in insuring a "grocery," defendants knew that liquor might be sold there; and that the plaintiff was entitled to recover.

ACTION on a fire insurance policy by the administrator of the insured.

Fourth plea: That defendants were a Mutual Insurance Company under ch. 161 R. S. O.: that the insured represented in his application that the building was used as a grocery store; and that after the effecting of the insurance it was, without plaintiff's consent, used as an unlicensed shop for the sale of spirituous liquors, whereby defendants were exposed to greater risk than when the insurance was effected; and no additional premium was paid.

Issue.

In the application the applicant described himself as a grocer, and the store as used as a grocery, and the policy covered the store and the stock of groceries and patent medicines, &c., in the store and an adjoining building. Nothing was stated either in the application or policy as to whether the insured had a license or not to sell liquor.

At the trial, at Cobourg, at the last Spring Assizes, before Burton, J.A., and a jury, defendants obtained leave to add another plea, that the insured concealed from defendants, at the time of his application, the fact that liquor was being sold on the premises, which was a fact material to the risk, and should have been disclosed.

There was evidence of some parties having bought and drunk liquor on the premises in question. It was left to

the jury to say if the assured, without the knowledge or assent of the company, was in the habit of selling spirituous liquors in the store, and they found this for defendants. They also found that the risk or hazard was not increased thereby.

A verdict was entered for the plaintiff. The person assured had died.

May 20, 1880. *J. B. Clarke*, obtained a rule *nisi* for a new trial on the law and evidence.

November, 20, 1880. *W. Mulock*, shewed cause. There was no misrepresentation on the part of the insured in making the application. The application stated that the building was used as a grocery, and it was intended to be so used. Technically, a grocery is a place where, amongst other things, liquor is sold, and in this country all grocers as a rule sell liquor in the same manner as other merchandise; so that whether the term "grocery," as used in the application, is interpreted in its strict sense or in the ordinarily accepted meaning, in either case it implies a place where liquor may be sold. The mere fact that the insured may not have had a license to sell liquor, in no way altered the fact that he was a grocer, as stated in the application. Even if it should be held that the insured had no right to sell liquor on the premises, still, in order to affect this contract, the amount sold must have been sold in such quantities and under such circumstances as to materially affect the risk. The question of materiality was one entirely for the jury, and they have found that the risk was not increased by the sale of liquor. Had the defendants considered the sale of liquor as a circumstance to be made known to them, they should have asked the insured in the application whether liquor was sold on the premises.

Bethune, Q. C., and *J. B. Clarke*, contra. A grocer is not entitled to sell liquor. There is more danger in an unlicensed than in a licensed grocery, and it should have been shewn by the application that the premises were being used as an unlicensed tavern.

December 10, 1880. HAGARTY, C. J.—The only question argued before us was, that on the evidence it appeared that the assured sold liquor by retail, consumed on his premises, which he had insured as a grocery store and dwelling. There was a small insurance on groceries and patent medicines. Defendants pleaded (*inter alia*) that he used the premises as an unlicensed tavern and liquor store, a material fact which should have been disclosed. We think by insuring a village “grocery” the company had knowledge that liquors might be sold therein. We are not called on to discuss whether the question of licensed or unlicensed was enquired into or was relevant. The question as put and answered did not suggest a selling of liquors to be drunk on the premises, but literally might refer only to a sale proper in a grocery. Our judgment does not, however, wholly depend on this.

We cannot say that the evidence was such that the jury were bound to hold that the risk was increased, nor can we say that there was any clear misrepresentation or concealment of any material fact. There was no charge of fraud as to the loss, the fire not having originated on the assured’s premises.

On the whole, we do not feel that we are bound to interfere.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

ROBINS V. CLARK ET AL.

Interpleader—Chattel mortgage—Defective registration—Fraudulent preference—R. S. O., Cap. 118.

G. & E., bakers, on the 18th May, 1880, agreed with the defendants that if the latter would supply them with flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on the 12th. G. & E. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so in case the mortgagors "should attempt to sell, dispose of, or in any way part with the possession of said goods," and removed them to their own warehouse. The mortgage also contained a re-demise clause. The jurat of the affidavit of *bona fides* was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 17th June, and the sheriff seized the goods under it on the 30th June.

Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz, when the flour was first sold on credit on the 18th May, to enable defendants to carry on their business; and therefore there was, under R. S. O., ch. 118, no preference of defendants, who became creditors only by this act.

Held, also, the property having passed by the bill of sale, and the defendants being in actual possession when the plaintiff's attachment issued, that they had a right to retain the goods as against the plaintiff, subject to the mortgagors' right of action, if any, for taking possession before default.

Seemle, however, that under the clause in the mortgage above mentioned, defendants were justified in taking possession when the mortgagors absconded, leaving no one in charge of the goods.

Interpleader issue, tried at the last Fall Assizes at Toronto, before Morrison, J. The question was, whether certain goods seized by the sheriff on the 30th June, 1880, under an attachment, tested 17th June, 1880, at the instance of the plaintiff, against the estate of William Gow and James English, were or were not the property of defendants as against Robins, an attaching creditor.

Gow & English were bakers in Toronto. They had formerly a partner named Barron, and defendants, who were flour dealers, had some dealings with them, which were closed by a note on the 14th May. Barron retired, and on

the 18th May defendants began to deal with Gow & English. The latter wanted flour, and defendants asked what security they could give. They agreed to give security on their horses, waggons, and baking utensils. Defendants asked them to have the proper legal document drawn up, and they said Robinson & Kent would draw it. Both defendants swore they would not have thought of giving them flour except on this security: that the giving this security was the condition of getting the flour, and that they had no idea of obtaining any preference over other creditors, and they swore they had no suspicion of their credit. Up to the 26th May, flour had been supplied to the extent of \$59; on the 28th May, forty bags, and on 1st June, seventy bags. There was a delay in completing the proposed security. The defendants called respecting it, and sent a message, and on 26th May wrote to Gow & English asking for the bill of sale, and stating that they expected it would have been ready: "We presume your solicitor has drawn it up, and if so please bring it down and we will get things put in shape." The mortgage when given merely covered these sales to Gow & English, and not any dealing with the old firm.

On 10th June a chattel mortgage was executed by Gow & English to defendants, in consideration of the then debt of \$894.62, covering certain horses, waggons, bakery, plant and shop furnishings, flour, and stock-in-trade on the premises, 310 Yonge street, and the flour and stock in hand, to be bought from time to time to replace what had been used in course of business, with a defeasance on payment of that sum and interest, on 4th September following.

There was a clause enabling the mortgagees to enter, seize, &c., in default of payment, "or in case the mortgagors should attempt to sell or dispose of, or in any way part with the possession of said goods and chattels, or any of them, or to remove the same, or any part thereof, out of the city of Toronto, or suffer or permit the same to be seized or taken in execution without the consent of the mortgagees."

There was also a clause that until default the mortgagors should have quiet possession and use of the goods. It was executed only by the mortgagors.

The usual affidavit of *bona fides* was sworn to on 11th June, but the jurat was not signed by the commissioner. It seemed to have been filed on the 12th of June.

Gow & English appeared to have absconded about or previous to the 14th of June, and on that day defendants gave a warrant to a bailiff to seize all these goods. The goods in question were thereupon seized and removed to defendants' premises, and were in their actual possession when the plaintiffs' attachment issued on 17th June. The sheriff took formal possession, and this interpleader issue was directed on his application.

It was urged for the plaintiff that the chattel mortgage was void; first, for defect in the affidavit, and also under R. S. O. ch. 118, sec. 2, as to assignments, transfers, &c., made by insolvents to defeat creditors or to give preference.

The learned Judge found that at the time of Gow & English absconding or being missed on the 12th of June, they were in insolvent circumstances, and that they were insolvent. The mortgage was executed on the 10th of June to the defendants, and he considered that the circumstances under which the mortgage was executed justified him in finding that it was done with intent to give the defendants a preference over other creditors. He found a verdict in favour of the plaintiff.

November 17, 1880. *Armour* obtained a rule to enter a verdict for defendants.

On December 2nd, 1880, *Rose* shewed cause. The chattel mortgage of the defendants is admittedly not within the statute, for the commissioner had not signed the jurat of the affidavit of *bona fides*; and there was no immediate delivery of the goods to the grantees: See sec. 4 of the Chattel Mortgage Act, R. S. O. ch. 119; *Ex parte Mackay*, L. R. 8 Chy. App. 643; *Ex parte Conning*, L. R. 16 Eq. 414;

Edwards v. Edwards, L. R. 2 Chy. Div. 291. [ARMOUR, J., referred to *Curtis v. Webb*, 25 U. C. R. 576.] The taking of the goods was therefore tortious, and the defendants are not entitled to retain them: *Ex parte Fletcher*, L. R. 5 Chy. Div. 809; *Bank of Toronto v. McDougall*, 15 C. P. 475; judgment of Gwynne, J., in *McAulay v. Allen*, 20 C. P. 424. The chattel mortgage is also void under R. S. O. ch. 118, sec. 2, as being a fraudulent preference.

E. Douglas Armour, contra. There can be no preference here, because, as fully appears by the evidence, the defendants were not creditors when the agreement to give this mortgage was made. They became creditors by the arrangement of which the giving of this mortgage is one of the details. It should be considered as made at the time it was agreed to be given: *Hutton v. Cruthwell*, 22 L. J. Q. B. N. S. 78; *Allan v. Clarkson*, 17 Gr. 570; *Ex parte Izard*, L. R. 9 Chy. App. 371; *Mercer v. Peterson*, L. R. 2 Ex. 304. It was made with the express intention of empowering Gow & English to carry on their business, and the evidence shews that during the period over which the defendants' advances to Gow & English extend, the latter paid the plaintiff and McLaughlin, a witness for the plaintiff, a sum equal to the value of the advances. There was therefore no fraudulent intent to defeat or delay creditors: *Risk v. Sleeman*, 21 Gr. 250; *Gottwalls v. Mulholland*, 15 C. P. 62, affirmed on appeal in 3 E. & A. 194; *Merchants' Bank v. Clarke*, 18 Gr. 594. There being no intent to defeat creditors or to fraudulently prefer the defendants, they are entitled to the goods, for though the mortgage does not comply with the Act, it is a good common law conveyance; and the possession taken by the defendants within the five days allowed for filing by the bill, dispensed with the necessity of observing the Act in this respect: *Marples v. Hartley*, 30 L. J. Q. B. 92; *Ex parte Fletcher v. Henty*, L. R. 5 Chy. Div. 809. The defective registration does not place the defendants in any worse position than if they had never been registered: *Banbury v. White*, 2 H. & C. 300. The mortgage provides that the defendants may take

possession as soon as the mortgagors "part with the possession" of the goods. This they have done by absconding, and the mortgagees have the next best title to them. If any one is injured, it is the mortgagees, who have the right to an action for injury to their equity of redemption: *McAulay v. Allen*, 20 C. P. 423. *Samuel v. Coulter*, 28 C. P. 240.

December 31, 1880. HAGARTY, C. J.—There was evidence from which it was reasonable to find that Gow & English, at the date of the mortgage, were in fact insolvent. But there was no evidence whatever to implicate the defendants in any design to obtain any undue preference as their creditors. They became their creditors by the very arrangement on which the security was contracted for.

They supplied them with flour to enable them to carry on their business on the express agreement that they were therefor to obtain the security, and the flour was delivered and the debt incurred solely on such a contract for security.

There is no contradiction whatever of testimony or attempt to disprove the truth of the defendants' statements on this point.

I think we must not hold the bill of sale void merely on the words of the statute. As I understand the law, we are to consider it as given when the contract to give it was entered into, viz., when the flour was first sold on credit, about the 18th of May. At that date, at least, I can see no ground for impeaching the transaction. It was in every way fair. It was in no way a dealing by which a preference was given to one existing creditor over another. It was an advance of goods specially to enable the parties to carry on their ordinary business, and the defendants became creditors as the result of the contract for security: *Risk v. Sleeman*, 21 Grant 250; *Allan v. Clarkson*, 17 Grant 570; *Gotwalls v. Mulholland*, 3 E. & App. 194. And as to referring back to the time of agreement for security: *Ex parte Izard*, L. R. 9 Chy. App. 271; *Mercer v. Peterson*, L. R. 2 Ex. 307, and in App. 3 Ex. 104.

Then it is urged that the bill of sale is void under the Chattel Mortgage Act. The defendants' right must turn on their having taken actual possession under their security before the issuing of the attachment. The case may be considered apart from that statute.

When the attachment issued the goods were in the actual possession of the defendants, and the property in them passed by the bill of sale, assuming that to be a valid security.

It is urged that under its terms the taking possession by defendants was a tortious act, as default had not been made. I assume (for the argument) that the redemise clause is effectual, though the mortgage was not executed by the grantees.

First, was default made by Gow & English absconding and leaving the goods apparently abandoned by them? I do not know of any express authority whether such an abandonment would amount to a breach of the clause as to "selling, disposing, or in any way parting with the possession of said goods and chattels."

If the case depended on this, I would be disposed to hold (in the absence of authority) that a mortgagee on such a clause might take possession of goods requiring care and attention for their preservation, if abandoned by the mortgagors absconding from the country, leaving no one in charge for their management or protection. In the case of horses or other animals, I can hardly understand how in such a case a mortgagee should not, for his own and for their protection, take possession when found to be abandoned by the mortgagor.

But I do not think that defendants' right depends on such a point. They were in full possession. If they had taken possession from the mortgagors before default, in breach of the redemise clause, they would be liable in trespass. But the measure of damages would not be the value of the goods, but the value of the mortgagor's right to retain until default.

Brierly v. Kendall, 17 Q. B. 937, is express on that point.

In an action by mortgagor against mortgagee for seizing before default, nominal damages only were held to be recoverable under the circumstances. Here no other damage could be looked for. The right to bring such an action appears by *Fenn v. Bittlestone*, 7 Ex. 152.

The property in the goods was in the present case in defendants by the bill of sale. They might be liable to the mortgagors for seizing two months too soon under the redemise clause. But I do not see how that can affect their rights on this interpleader issue. As it is framed I think there can be no doubt that the goods were the property of the defendants against the plaintiff, Robins, the attaching creditor. The mere fact that defendants took possession of their own property two months before the determination of a demise thereof to another person, cannot destroy their right.

We are not called on to determine whether the equity of redemption of Gow & English, when defendants took possession, is or was an available asset for the attaching creditors.

The law as to mortgagor and mortgagee and this redemise clause is stated in the notes to *Keech v. Hall*, 1 Sm. L. Cases, 523. See also *Ex parte Fletcher*, L. R. 5 Chy. D. 809, the head note to which says: "Actual possession taken by the grantee of an unregistered bill of sale, even though taken wrongfully, may exclude the operation of the Bills of Sale Act. But though when possession is taken rightfully the possession will be extended by construction of law beyond the actual physical possession, this will not be done in the case of a wrongdoer. His possession will not be constructively extended beyond his actual physical possession."

The right to hold, if actual possession be even wrongfully taken, is not questioned.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

DAVIES V. FUNSTON.

Promissory note—Guarantee—Sufficiency of—Parol evidence.

The defendant, after a note payable to the plaintiff had become due and while it remained unpaid, endorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. T. D. & Co. (the plaintiffs), on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security.

Held, that the evidence that the giving of time to C. was the consideration for the guarantee did not contradict the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration.

DECLARATION :

First count, on a promissory note for \$400, made by one Letitia Funston, on 23rd June, 1879, payable three months after date, to the order of the defendant, at the Canadian Bank of Commerce, and by the defendant indorsed to the plaintiff, averring that the defendant dispensed with presentment.

Second count, on a similar note, averring that defendant dispensed with presentment and notice, and that after maturity he promised to pay it.

Third count, that the said Letitia Funston was indebted to the plaintiff in the sum of \$400, the promissory note in the said first count mentioned, as collateral security for the due payment by one James Chamberlain of the sum of \$400 and upwards to the plaintiff; and in consideration that the plaintiff would forbear and give to the said Letitia Funston and the said James Chamberlain time for the payment of the said indebtedness, the defendant guaranteed and promised the plaintiff to be answerable to him for the payment of the said sum of \$400, secured by the said note; and the plaintiff did accordingly forbear and give time to the said Letitia Funston and the said James Chamberlain, for the payment of the said indebtedness aforesaid, and all conditions were fulfilled; yet the said Letitia and the said James Chamberlain did not, nor did

either of them, or the said defendant, pay to the plaintiff the said sum of \$400, &c.

Fourth and subsequent counts, the common counts.

Pleas :

First plea, to first and second counts, did not indorse.

Second plea, to first and second counts, denial of presentment, and that it was dispensed with.

Third plea, to first and second counts, denial of notice, and that presentment and notice were dispensed with.

Fourth plea, to first and second counts, want of stamps.

Fifth plea, to second count, denial of promise to pay upon maturity.

Sixth plea, to third count, did not guarantee and promise as alleged.

Seventh plea, to third count, did not forbear and give time to the said Letitia Funston and James Chamberlain, as alleged.

Eighth plea, to first and second counts, the giving of time to Chamberlain, for whom Letitia Funston had made and the defendant had indorsed the promissory note as sureties, and thereby releasing the defendant.

Ninth plea, to third count, the giving time to Chamberlain after the time given to Letitia Funston and to him had elapsed, and thereby releasing the defendant.

Tenth plea, to the common counts, never indebted.

Eleventh plea, (added at the trial), to the third count, that the said Letitia Funston never was indebted as alleged.

Issue.

The cause was tried before Morrison, J.A., and a jury, at the last Fall Assizes, at Toronto, when it appeared that the plaintiff lent to one James Chamberlain, a son-in-law of the defendant, \$400, to enable him to commence business as a tavernkeeper, taking as security a chattel mortgage from Chamberlain and a promissory note, dated June 23rd, 1879, at three months, made by Letitia Funston, the defendant's wife, payable to the order of the plaintiff at the Canadian Bank of Commerce, for \$400. Upon the back of this note the defendant put his name as security for the payment

thereof to the plaintiff. After this note fell due, and on the 28th day of October, 1879, the defendant signed the following instrument, indorsed on the said promissory note: "I guarantee the payment of the within note to Messrs. Thos. Davies & Co.," (the plaintiff) "on demand." Both the plaintiff and defendant agreed in their evidence that the consideration for the giving by the defendant of the guarantee was, that the plaintiff was not to press Chamberlain for payment of his debt. No definite time of forbearance to press was mentioned, but the plaintiff did in fact forbear to press Chamberlain for over eight months after the guarantee was given, when he demanded payment of the note from the defendant, and then brought this action. The learned Judge directed a verdict for the defendant, with leave to the plaintiff to move to enter a verdict for him upon the third count for \$310.

November 17, 1880, *Hall* obtained a rule *nisi* accordingly.

November 30, 1880. *McCarthy*, Q. C., shewed cause. The plaintiff cannot maintain his action on the first count, charging the defendant as indorser, as the note being payable to plaintiff's order had never been transferred by them. Then, as to the guarantee, the plaintiff cannot recover, as there is no consideration shewn for the giving of same, the guarantee being to pay *on demand*. It is alleged that the consideration was the giving of time to Mrs. Funston. There is no evidence that the plaintiff agreed to give time; certainly no time was fixed. But such a consideration would be inconsistent with the guarantee, which is to pay on demand. It has not been shewn that any demand had been made before action. This would be necessary, especially if it was a guarantee for the payment of the note by Mrs. Funston. It was also contended that plaintiff's subsequent dealings in taking a mortgage amounted to a giving of time to Chambers, and the sureties were thereby discharged. He cited *Crofts v. Beale*, 11 C. B. 172; *Childs v. Monins*, 2 B. & B. 460; *Williams v. Clarke*, 16 M. & W. 834.

Reeve, contra. It is admitted that the plaintiff cannot recover against defendant as indorser, although the plaintiff might before action have himself indorsed the note so as to have enabled him to recover against defendant as such: *Wilders v. Stevens*, 15 M. & W. 208. It is also admitted that although an indorser on a bill may be treated as a new drawee, still the plaintiff does not contend that defendant would be liable as a new maker of the note: *Gwinnell v. Herbert*, 5 Ad. & E. 440; *Jackson v. Hudson*, 2 Camp. 447. But defendant was liable on the note as a guarantor, and on a count framed charging him as such the plaintiff can recover. It is plain the money was advanced to Chambers upon the strength of the note in question, and when defendant wrote his name on the back of the note he, as well as plaintiff, supposed that he had rendered himself liable for payment of it.

The facts and circumstances under which the note was given are admissible in evidence, and if they show that a person writing his name on the back of a note intended to guarantee the payment of it, although he may not render himself liable as indorser, he can be charged as a guarantor: *Matthews v. Blexsome*, 33 L. J. Q. B. 213; *Denton v. Peters*, L. R. 5 Q. B. 475. It would be no answer to that. There was no notice of dishonour, as a guarantor would not be entitled to notice: *Palmer v. Baker*, 23 C. P. 302. As to the guarantee on the back of the note, plaintiff submits that it is immaterial whether it was shewn that time was agreed to be given or not, the original liability contracted on the strength of defendant's promise to pay being a sufficient consideration for any subsequent promise made by him. But if any further consideration were necessary, it is shewn that the plaintiff agreed to give time, which would mean a reasonable time, and the fact that the guarantee is for payment on demand is not inconsistent with it. The proper construction to be placed upon the guarantee is, "That in consideration that the plaintiff would give time for payment, if payment were not made he, defendant, would on demand pay the amount."

As to the objection that no demand was proved, this was not necessary, as the suit was sufficient notice. This could only be urged if the guarantee was for payment by Mrs. Funston, which is not a reasonable construction of the guarantee : *Oldershaw v. King*, 5 W. R. 754.

December 31, 1880. ARMOUR, J.—Two objections were urged before us to the making of the rule absolute ; first, that parol evidence was not admissible to shew that the consideration for the guarantee was the giving time to Chamberlain, because the effect of it would be to contradict the written guarantee, which was on demand ; and second, that the parol evidence, if admissible, failed to establish a good consideration for the guarantee. The words, “on demand,” clearly refer to a demand upon the guarantor, and it is only necessary to set forth the effect of the whole guarantee, of the consideration as established by the parol testimony, and of the promise as evidenced by the writing, in order to show that the parol evidence in no way contradicts the written instrument. It would read thus : “In consideration of your forbearing to press Chamberlain for your loan to him I hereby guarantee payment of the within note to you, after such forbearance, on demand.” As to the second objection, the promise not to press Chamberlain for payment, followed by the forbearance to press him for a reasonable time, constituted, in my opinion, a good consideration for the guarantee.

The cases of *Oldenshaw v. King*, 2 H. & N. 399, S. C. in Err. 517, and *Wynne v. Hughes*, 21 W. R. 628, seem to be conclusive in the plaintiff’s favour.

The rule will therefore be absolute to enter a verdict for the plaintiff, upon the third count, for \$310.

See also *Coles v. Pack*, L. R. 5 C. P. 65.

HAGARTY, C. J.—I agree in the result with my brother Armour. When defendant wrote on the back of this overdue note, “I guarantee the payment of the within note to Messrs. J. Davis on demand,” both he and the plaintiff

must have understood that he was intending to make himself responsible for its payment. It is the fair result of the evidence that he did so in consideration of time being given to Chamberlain, and time was accordingly given on the faith of it; a reasonable time, as we should find. The law would be in an unfortunate state if all this could be done, and the plain contract and intention of the parties defeated on some technical ground unknown to either of the parties.

The cases cited shew that a contract which the law interprets to mean the giving of a reasonable time, is sufficient to establish a good consideration, and since the Mercantile Amendment Act (*a*) such consideration need not necessarily appear in the instrument. I also think that "on demand" must mean on demand on the guarantor after such reasonable time is given.

I think we are bound to read and construe it on the well known "*Ut magis valeat quam pereat*" principle.

CAMERON, J., concurred.

Rule absolute.

(*a*) R. S. O. ch. 117, sec. 10.

IN RE LEIBES V. WARD.

Division Court—Deputy Judge—Power of his deputy.

Under the authority of the following deputation:—"Belleville, Ont., 24th July, 1880—I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy to hold the Second Division Court of the County of Hastings, on Monday, the 26th day of July, instant, at the Town Hall, in the Township of Sidney.—T. A. Lazier, junior Judge, C. H.," the person therein named tried this case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August following, at the Judge's Chambers in Belleville, outside the limits of the second Division, but within the County, without having named a day and hour for delivery thereof in writing at the Clerk's office.

Held, (1) That the word "Judge" in sec. 20 of R. S. O., cap. 47, includes the junior Judge, and that the deputation was therefore valid. (2) That the proper construction of the same was, "to hold the Second Division Court of the County of Hastings to be holden on Monday," &c., and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the junior Judge during the time of his appointment, wherever he might be within the County. And the rule was therefore made absolute to rescind the order made by Galt, J., for a prohibition.

CAMERON, J., dissenting.

November 20, 1880. *G. B. Gordon* obtained a rule *nisi*, on behalf of the plaintiffs, calling upon the defendant to shew cause why the order for a prohibition herein made by Galt, J., in Chambers, dated October 22nd, 1880, should not be reversed and set aside, with costs, and costs of the motion in Chambers, on the following grounds: 1. That it did not appear on the evidence that there was no jurisdiction, as alleged. 2. That the said B. F. Ward, by his attorney or agent, acquiesced in, and was estopped from questioning the proceedings as to which he alleged the Judge or acting Judge had no jurisdiction. 3. That the delivery of his decision by the Judge beyond the limits of the jurisdiction was no ground for prohibition. 4. That the acting Judge had authority to deal with said plaint in the manner complained of.

The facts shewn upon the affidavits filed in Chambers and in this Court were substantially these: The plaint in the Court below was regularly entered for trial in the

Second Division Court of the county of Hastings, and came on for trial at the Court held for that division, on Monday, the 26th of July, 1880, at the Town Hall, in the township of Sidney, before E. B. Fralick, Esq., acting as deputy for the junior Judge of the County Court of the county of Hastings, under the following deputation :—

“BELLEVILLE, Ont., 24th July, 1880.

“I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy, to hold the Second Division Court of the county of Hastings on Monday, the 26th day of July, instant, at the Town Hall, in the township of Sidney.

“T. A. LAZIER,

“Junior Judge, C. H.”

The defendant was present and gave evidence on his own behalf at the said trial, and was represented thereat by a barrister, and the plaintiffs were represented thereat by an agent.

The deputy Judge, after hearing the evidence adduced on both sides, at the request of the defendant's counsel, and with the consent of the plaintiffs' agent, in order that authorities might be cited upon the point of law involved, postponed the giving of his judgment till the 2nd of August, 1880, at 10 a.m., at the Judge's Chambers in the Shire Hall in Belleville, said Chambers being outside the limits of the said Second Division Court, but within the said county, but did not name a subsequent day and hour for the delivery thereof in writing at the clerk's office.

At the said time and place the plaintiffs' agent, and the defendant and his said counsel, appeared before the said E. B. Fralick, Esq., and the said E. B. Fralick, having heard argument by the defendant's counsel, thereupon gave judgment for the plaintiffs for the full amount of their claim and costs. No objection was at that time raised to the jurisdiction or power of the said E. B. Fralick to so give such judgment at such time.

Thereafter, as stated by the said counsel for the defendant, in his affidavit filed, “application was made by defendant to set aside the said judgment, or for a new trial, on the

grounds shewn in said application, in which the objection was taken, that the Judge who tried the case had no power to enter judgment at the time and place entered; and such application was afterwards refused."

Thereupon a summons was obtained from Galt, J., for a prohibition, on the following grounds: 1. That the said deputy Judge had no jurisdiction to adjourn the cause to a place without the limits of the Second Division Court where the case was tried, and had no power to give judgment thereat. 2. That the said deputy Judge had no jurisdiction to give any judgment out of open Court where the trial was had, without having first named a day and hour for the giving of his written judgment at the office of the Clerk of the said Court. 3. That the said judgment was never duly given, and that the said deputy Judge was *functus officio* when he did pronounce and deliver the same. This summons, after argument, the said learned Judge made absolute, granting the order to set aside which the said rule *nisi* was granted.

December 7, 1880. *Holman* shewed cause. Section 20 of the Division Court Act, R. S. O. ch. 47, provides that in case of the illness or absence of a Judge, the Judge may appoint some barrister to act as his deputy, and the barrister so appointed shall, as Judge of the Division Court, during the time of his appointment, have all the powers and privileges, &c. It does not appear that the Judge was ill or absent when the appointment was made. Section 21 shews that the Judge mentioned in section 20 is the County Judge, and the County Judge is the senior Judge: R. S. O. ch. 42 sec. 3. In this case the junior Judge made the appointment, and he had no power: *Elora Agricultural Ins. Co. v. Potter*, 7 P. R. 12. Mr. Fralick had the powers of a Judge only "during the time of his appointment," which was for the 26th day of July, 1880: R. S. O. ch. 47, sec. 20. He had no power to adjourn the trial beyond that day, and after that day he was *functus officio*: *Hoey v. McFarlane*, 4 C. B. N. S. 718. The Lord Chancellor, after

resigning, could not give judgments in cases previously argued, and it required a Special Act of Parliament to enable him to do so: *S. C.*, p. 735. Mr. Fralick's authority was limited to a particular division, which was the Second Division Court of Hastings, and he must act within that division: *Re Burrowes*, 18 C. P. 493. The Court must be held "within such division," by sec. 8; otherwise he might as well have adjourned to Toronto as Belleville. The chief object in establishing Local Division Courts was, that the litigants might conduct their own cases, which if this precedent is established would be defeated. The only cases where the Court can be held outside of the division are under subsection 2 of section 9. The objection is to the root and foundation of the jurisdiction: *Hudson v. Tooth*, L. R. 3 Q. B. D. 53; *Sergeant v. Dale*, L. R. 2 Q. B. D. 568. Even if his deputation continued, no subsequent day and hour were named for the delivery of the judgment, as required by section 106. In any event, he was *functus officio* when he delivered judgment, and could not transmit the same to the clerk to enter judgment: *Re Smart and O'Reilly*, 7 P. R. 366. There was no delay, as defendant, as soon as he acquired knowledge of the want of jurisdiction objected on the application for a new trial: *Marsden v. Wardle*, 3 E. & B. 695. Total want of jurisdiction cannot be cured by assent of parties: *Smith v. Rooney*, 12 U. C. R. 661; *Thompson v. Ingam*, 14 Q. B. 710; *Jones v. Owens*, 5 D. & L. 669; *Cleghorn and Munn*, 2 U. C. L. J. (N. S.) 133. Where a Queen's Counsel holds the Assizes the Legislature has specially conferred power to reserve the giving of his decision: R. S. O. ch. 41 sec. 8. Mr. Fralick was appointed for a particular Court, for a particular day, to be held at a particular place, within the limits of a particular division, and he partially heard the case, and gave judgment on a different day, at a different place, and without the limits of the particular division for which he was appointed, when he was clearly *functus officio*.

G. B. Gordon, contra. Assuming that the gentleman who held the Court was *functus officio* at the time he gave judg-

ment, then the conduct of the defendant was such that it has precluded him from now obtaining relief against the judgment. The adjournment from 26th July to August 2nd, was made almost entirely at his instance, and a fresh argument took place in Belleville on August 2nd, in which the defendant's attorney again took part. The decision might have been in his favour. It so happened that it was against him: *Russell* on Awards, 141, 685, 686; *Roberts v. Humby*, 3 M. & W. 120; *Loudon v. Cox*, L. R. 2 H. L. 239; *Archibald v. Bushey*, 7 P. R. 304; *Re Smart and O'Reilly*, 7 P. R. 364. Though *Hudson v. Tooth*, L. R. 3 Q. B. D. 46, may at first appear to be against the contention in this case, it is, so far as it touches upon *acquiescence*, an element absent in that case, an authority in defendant's favour: see concluding portion of judgment of Lush, J. The acting Judge was, however, acting within his authority when he gave judgment on August 2nd. By the 20th section of R. S. O., ch. 47, he is to have, while his authority lasts, all the powers which the Judge who had appointed him would have had. One of these powers is, by the 106th section, to postpone the delivery of judgment as therein authorized. It must follow then that, having postponed the delivery, he has power to deliver judgment as the Judge himself could have done. But it is said that the 106th section has not been literally complied with: that it should have been delivered at the clerk's office at a time previously fixed. *Smart v. O'Reilly*, ante, and *Re Burrowes*, 18 C. P. 493, are authorities in favour of the plaintiffs, that the defendant cannot now object. Again, it is said that the junior Judge, who appointed Mr. Fralick, had no power to do so, and that it is the senior Judge who must appoint. A careful reading of the 20th section must convince that where there is a junior Judge it is he that is intended, and the words "County Judge," in the 21st section, do not necessarily indicate the senior Judge, for the junior is a *County* Judge also, though not commonly called so. Moreover, the 19th section says that the junior Judge shall "préside over the Division Court."

December 31, 1880. ARMOUR, J.—The deputation which gives rise to the present controversy was made under R. S. O. ch. 47, sec. 20, which enacts that “in case of the illness or absence of the Judge, a Judge of the County Court of any other county may hold the Court, or the first mentioned Judge may appoint some barrister of the bar of Ontario to act as his deputy; and the barrister so appointed shall, as Judge of the Division Court, during the time of his appointment, have all the powers and privileges, and be subject to all the duties vested in or imposed by law on the Judge by whom he has been appointed.”

It is not shewn upon the affidavits and papers filed that the senior Judge of the County Court of the county of Hastings was neither ill nor absent, nor that the junior Judge of that Court was neither ill nor absent, nor that the circumstances did not exist which would enable the junior Judge, provided he is included in the words “the Judge” in the above section, to appoint some barrister of the bar of Ontario to act as his deputy. I think, therefore, that we must assume, for the purpose of this decision, that all such circumstances did exist as enabled the junior Judge, provided he is so included, to make such appointment.

The next step is, to determine whether he is so included.

R. S. O. ch. 42, sec. 3, provides that “in case more than one County Court Judge is appointed for any county, then, unless otherwise expressed in the commission, the Judge whose commission has priority of date shall be styled ‘The Judge of the County Court of’ (as the case may be), and the other Judge of the same Court shall be styled ‘The junior Judge’ thereof;” and section 11 of the same Act provides that “where any power or authority is, by this Act, or by any statute now in force or which may hereafter be passed, conferred upon or is otherwise exercisable by the senior Judge of a County Court, whether with reference to the holding of any of the Courts of the county which the said Judge may hold, or to the business of any of the said Courts, or to any other matter or thing over

which the said Judge has jurisdiction, either by virtue of any statute or otherwise howsoever, the like power and authority shall be possessed by and may be executed by the junior Judge, subject, however, to the general regulation and supervision of the senior Judge."

The effect of these provisions seems to be to invest the senior and junior Judges each with equal judicial power, and therefore whatever the senior Judge could do in case of his illness or absence the junior Judge could also do in case of his illness or absence.

Then, by R. S. O. ch. 47, it is provided, in sub-sec. 1 of sec. 19, that "The Division Courts shall be presided over by the County Court Judges or junior or deputy Judges in their respective counties," and in sub-sec. 2 that "The junior Judge for any county shall (subject to any other arrangement from time to time made with the senior Judge, or made by the Judges of a County Court district which includes such county,) preside over the Division Courts of the county;" and in sub-sec. 3, that "The appointment of a junior Judge shall not prevent or excuse the Judge of the County Court from presiding at any of the Division Courts within his county when the public interests require it."

Reading these provisions of the R. S. O. ch. 47, with section 20, above set out, which immediately follows them, I am compelled to the conclusion that the words "the Judge" in that section include the junior Judge, whose imperative duty it is, by sec. 19, sub-sec. 2, to preside over the Division Courts.

It was suggested on the argument that in case of illness or absence the Judge could not appoint a barrister to act as his deputy to hold a particular Division Court, but that he could only appoint him to act as his deputy generally; but I see no reason why the statute should be so read.

I think, therefore, the deputation was validly made.

It remains to determine whether what was done by Mr. Fralick was within its scope.

It was contended by the applicant that the deputation was only for Monday, the 26th day of July, and that Mr.

Fralick was only deputy while within the limits of the Second Division Court, and that the moment twelve o'clock of the night of the 26th came, or he went outside of the limits of that Court, he was *functus officio*.

But this is, in my opinion, altogether too narrow a construction to put upon the deputation.

"To hold the Second Division Court of the county of Hastings, on Monday, the 26th day of July, instant, at the Town Hall, in the township of Sidney," is in effect the same as saying to hold the Second Division Court of the county of Hastings, to be holden on Monday, the 26th day of July, instant, at the Town Hall, in the township of Sidney, the time and place mentioned being merely used as descriptive of the time and place for holding the Court, and not for the purpose of limiting the holding of the Court to one day—the 26th—nor to one place—the Town Hall.

So that if the 26th did not suffice for the trial of all the cases entered for trial at that Court, Mr. Fralick could, in my opinion, under this deputation, have gone on trying such cases beyond the 26th until he had tried them all, and so that if, while he was engaged trying such cases, the Town Hall had been burned or blown down, he could have adjourned the Court to, and gone on trying such cases at some other convenient place within the said Division.

Nor was the effect of the deputation merely to clothe Mr. Fralick with the powers of the junior Judge, as Judge of the Division Court, while he, Mr. Fralick, was within the limits of the Second Division Court, but the effect of it was to clothe Mr. Fralick, wherever he might be within the county, with all the powers of the junior Judge, as Judge of the Division Court, during the time of his appointment, for the purpose of his holding the Second Division Court.

The time during which Mr. Fralick's appointment was to continue was not expressly stated in the deputation, but impliedly it was to continue, subject to the provisions of section 22, until he had performed the purpose for which it was made, which purpose was "to hold the Second Divi-

sion Court," which necessarily included the trial of the cases entered for trial at that Court; and clothed with the powers of the junior Judge, he had the power to postpone judgment under section 106.

He postponed judgment in the above named plaint till the 2nd day of August, 1880, at 10 a. m., at the Judge's Chambers, in the Shire Hall, in Belleville, and then and there, in the presence of the parties, pronounced his judgment. At the time he so gave judgment he was still, in my opinion, for the purpose of doing so, clothed with all the powers of the junior Judge, as Judge of the Division Court.

I therefore think that he acted throughout within the scope of his deputation.

Objection is, however, made that he did not name a subsequent day and hour for the delivery of his judgment in writing at the clerk's office.

Re Burrowes, 18 C. P. 493, is a direct authority that, under circumstances such as existed here, such omission is no ground for prohibition.

The rule will, therefore, be absolute to rescind the order with costs, and to discharge the summons, with costs.

CAMERON, J.—I am unable to concur in the conclusion arrived at by my learned brothers, and regret my inability to do so, as the decision of the learned barrister, who acted as deputy Judge, has, I believe, done ample justice.

The question presented for determination by this Court does not permit of the consideration of the merits of the case as between the parties litigant. It is a purely legal question, and, though the sum involved is small, important in principle, as the defendant seeks to prevent the enforcement of a judgment pronounced by an unauthorized person by the process of a Court of law. Its solution depends upon the result of the enquiry, was E. B. Fralick, Esq., the deputy of the Judge of the County Court of the county of Hastings? If he was, then I think, with the majority of the Court, he had the right, in common with the Judge or

junior Judge, to reserve his decision at the trial, and pronounce it in the manner he did. But I think he was not at the time he gave his decision such deputy, and therefore the case was *coram non judice*, and his decision wholly void. He derived his authority from an appointment in writing, given by T. A. Lazier, Esq., junior Judge of the county of Hastings, and sec. 20 of ch. 47, R. S. O. These are as follow :—

“ BELLEVILLE, Ont., 24th July, 1880.

“ I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy, to hold the Second Division Court of the county of Hastings, on Monday, the 26th day of July, instant, at the Town Hall, in the township of Sidney.

“ T. A. LAZIER,
“ Junior Judge, C. H.”

Section 20: “ In case of the illness or absence of the Judge, a Judge of the County Court of any other county may hold the Court, or the first mentioned Judge may appoint some barrister of the bar of Ontario to act as his deputy, and the barrister so appointed shall, as Judge of the Division Court, *during the time of his appointment*, have all the powers and privileges, and be subject to all the duties vested in or imposed by law on the Judge by whom he has been appointed.”

Under this section 20 no power or authority is given to the deputy outside of the time fixed by the appointment. His power is in express terms limited to the duration of his appointment. Then is there any, and if so what time fixed by the appointment? Is it not to hold the Court on Monday, the 26th July? My brother Armour very forcibly says, is this not in effect the same as saying to hold the Court to be holden on the 26th July, which would empower the deputy to continue the Court from day to day till the business of the Court was finished? I do not think the expressions are the same. To hold a Court on a particular day is a different thing, at all events in a case like the present, from a power to hold a Court to be holden on such a day.

We know that under a fiction of law the Courts of Assize and Nisi Prius, &c., held under commission, though they lasted for a month, were treated as lasting but one day, and all matters were alleged to have been done on the Commission Day; but no such fiction can apply here. There is nothing to shew that the Judge may not have intended to take the Court the second day, if it had lasted more than one, himself. The cause of his deputing another to act in his place is not alleged; if it had been absence, he might, at the time he signed the appointment, have intended to return in time to hold the Court the following day. We are not at liberty to speculate as to his intention. We have got simply to determine what is the natural import of the language used. If the words do bear the construction my brother Armour assigns to them, that does not make the judgment delivered after the Court rose valid, unless the appointment was then continuing, and it was not so continuing, in my opinion.

It may be tested in this way. Assume the appointment was for ten days, and the deputy reserved his decision, and did not announce it until the eleventh day, would it be valid? He would then, certainly, have ceased to be the Judge's deputy. Reading then the appointment to have in effect been one to hold the Second Division Court commencing on the 26th of July, when the Court rose the appointment would be equally at an end, as if the time that had been fixed had expired. The reservation of judgment, or the adjournment of a case, is a different thing from an adjournment of the Court, and what was done in this case cannot be held to have been an adjournment of the Court.

Whatever may be the proper form of an appointment of a deputy by a Judge, it seems to me clear that the deputy ceases to have any power under it after the time fixed by it has expired. Though the appointment to hold a particular Court may be within the power of the Judge under the above section 20, and I think it is, as the greater power of appointing a deputy to discharge all the duties of a Division Court Judge includes the less of doing only part

of those duties. The Legislature, however, in my opinion, contemplated a general appointment, which might be continued from month to month by giving to the Lieutenant-Governor the notice of renewal of such appointment, as provided for by sections 21 and 22 of the Act.

HAGARTY, C. J., concurred with ARMOUR, J.

Rule absolute.

BARBER V. MORTON.

*Bill of exchange—Principal and surety—Withholding facts from surety—
Discharge of surety.*

The defendant agreed with plaintiff that he would become responsible for the price of such goods as P. should order of the plaintiff. P. sent a written order to the plaintiff, stating the number of articles he wished to purchase, and naming the prices he would pay for some of them. The plaintiff shipped to P. a larger quantity of the goods than was specified in the order, and invoiced those as to which prices were specified at a higher price than mentioned in the order; and thereafter, without disclosing to defendant these facts, presented to him for signature a bill of exchange for the price of the goods shipped, representing to him that it was for the goods ordered. P. accepted the bill and kept the goods.

Held, that the defendant, being a surety, was entitled to be informed of the plaintiff's action in the premises, and that he was discharged from liability.

HAGARTY, C.J., dissenting.

THIS was an action by the plaintiff, as payee, against defendant, as drawer, of a bill of exchange, dated 7th June, 1879, for \$1,155.86, drawn on and accepted by W. D. Patterson, at five months, and not paid.

There were several pleas pleaded, in substance amounting to the defence, that defendant was surety for the acceptor, and drew the bill under the belief that it was for goods duly ordered by the acceptor, whereas it was for other goods, and at increased prices, &c.

The trial was at the last June Assizes, at Toronto, before Armour J., without a jury, who, after reserving judgment, subsequently found in favour of the defendant.

The facts were as follow: Plaintiff was a merchant in Toronto, where he resided. Patterson lived in British Columbia, and was defendant's brother-in-law, and wished, while in Toronto, to get some goods which he could sell in British Columbia at a profit. Defendant introduced him to plaintiff, and agreed to be responsible for the goods which Patterson would order. The first goods ordered were duly paid for. Afterwards other goods were ordered, and plaintiff came to defendant and brought an invoice of goods which had been sent off to Patterson. Plaintiff drew up the bill of exchange, and defendant signed it. He said he had previously told plaintiff that Patterson would probably order more goods, and that he would be surety for them. Defendant said he did not ask to see the invoice which plaintiff had with him, nor did he ask to see Patterson's order for them.

Plaintiff stated that Patterson first selected about \$300 of goods, and that in the case with them he had sent some samples of tweeds. He received a letter from Patterson, dated 9th April, 1879, enclosing an invoice or order for goods:

- "25 dozen brown canvas jumpers, or overshirts, large sizes, and pants to suit, made strong, leather gores or seams.
- "50 suits, tweeds of various marketable patterns, and running in price about \$9 per suit first cost; made American style, large size.
- "10 dozen cardigan jackets, to suit as large overshirts for miners, mixed with cotton.

"If you have any new goods, send a few samples, also. The blankets are so different in quality and mark *here*, shall send piece as sample, before giving orders."

In the letter enclosing this invoice, Patterson says: "You can forward me, without delay, the goods described in enclosed invoice * * let your prices to me be as moderate as possible in invoice forwarded me."

After the bill was drawn by defendant, plaintiff wrote on 6th June, to Patterson, enclosing an invoice of the goods for which the bill was given. This differed from the order.

There were 52 suits of tweed, instead of 50, ordered, and the price was \$10 instead of \$9; there were 52 dozen overalls instead of 25 dozen; 15 dozen socks, not ordered; 10 dozen miners' coats or jackets; 33 pants, not ordered.

In his letter plaintiff said: * * "We had a few pair of check pants which we know you can do well with.

* * Owing to the advance in price of trouserings, from the National Policy, our suits cost us more than when we gave you the estimate. * * We have drawn on you, &c. Any errors or omissions we will make right, if any are found in checking the goods."

Plaintiff explained as to the difference between Patterson's order and what he sent, that 52 suits were sent instead of 50, because they sell as nearly as possible pieces that would make three suits, but in order to get the requisite quantity of 50 ordered they had to take a piece which would make two suits over: that he sent the socks, from the fact that Patterson had bought all they had on the former occasion. He explained as to the 52 dozen overalls in the same way as the tweed suits. The pants he sent to fill the case, and keep from shifting: that it was very common to add some little goods to form the case. Nothing was said to defendant of any variance in the order or in the price. Plaintiff said he had no further communication about it from Patterson. Defendant said that he afterwards heard from Patterson that the goods were not according to order, and more than ordered, and he told him to write direct to plaintiff. After the bill fell due he said he told plaintiff of the difficulty, and that he (defendant) could not possibly recover from him, and that plaintiff would have to sue him (defendant) for the amount, and whatever amount was recovered against defendant the latter would have the recourse against Patterson.

August 26, 1880. *Bethune*, Q. C., obtained a rule *nisi* to set aside the verdict, on the ground that the plaintiff was entitled to recover.

December 7, 1880. *E. Douglas Armour* shewed cause. The evidence shews, and it is not disputed, that the defendant agreed to become surety for the payment of the price of such goods as Patterson, the acceptor of the bill, should order. It is reasonable that defendant should have protected himself by guaranteeing only what was ordered; for Patterson knew best what was suitable for his market, what stock he could carry, and what prices he could afford to pay. This is the surety's protection, and it is just that he should have been informed by the plaintiff that he was not carrying out Patterson's order, and in what respects he was departing from it. Patterson's order was explicit in setting out in detail the number of articles required, and the prices he was prepared to pay for some of them. The plaintiff went outside the terms of his agreement in shipping to Patterson a larger quantity of goods than that ordered. Patterson may have become liable to the plaintiff for the price of the goods by accepting them. But if so, that constitutes a new contract with the plaintiff, of which the defendant was not informed, and to which he never assented; for when the plaintiff presented to the defendant the bill for signature, without disclosing facts which the defendant was entitled to know, he obtained an assent to the new contract, which was not binding on him. The surety is the sole judge of whether he will be bound by the new contract: *Holme v. Brunskill*, L. R. 3 Q. B. D. 495, cited with approval in *Austin v. Gibson*, 4 App. R. 316, where the dissenting judgment of Brett, L. J., is criticised, and in *Canada Agricultural Ins. Co. v. Watt*, 30 C. P. 350; *Whitcher v. Hall*, 5 B. & C. 269, cited as a leading case in *Sanderson v. Aston*, L. R. 8 Ex. 73; *Pidcock v. Bishop*, 3 B. & C. 605.

Falconbridge, contra. It was admitted by counsel at the trial that Patterson had accepted the goods, and his acceptance is equivalent to an order. The amount sent in

excess of the order is very trifling, and as regards the suits and overalls, is explained by the plaintiff. Patterson also asks the plaintiff in his letter to send him "a few samples." It is not pretended that the defendant was in a position to exercise any judgment of his own as to the kind or amount of goods to be shipped, nor that any fraud was practised upon him. In a case of this kind the Court will consider whether or not the variation (if any) in the contract of suretyship is material. This action being on the bill of exchange the defence here set up is untenable, as in effect amounting to a partial failure of consideration: *Byles*, 13th ed., 133, note *o*; *Kilroy v. Simkins*, 26 C. P. 281; *De Colyar an Guarantees*, pp. 303, 305; *Stewart v. McKean*, 10 Ex. 675; *Sanderson v. Aston*, L. R. 8 Ex. 73; *Frank v. Edwards*, 8 Ex. 214.

December 31, 1880. HAGARTY, C. J.—Patterson was not examined as a witness. It was said some of the goods were sent back by him to Toronto, and plaintiff refused to take them, but no explanation was offered on this head, and it forms no part of the grounds of my judgment.

I was struck by the extreme meagreness of the evidence as to Patterson's dealing with the goods when he received them, and requested defendant's counsel to state whether he had accepted them, or repudiated them as not being according to order.

His counsel finally admitted that Patterson had so accepted the goods as to charge himself with them as between him and plaintiff.

There seems to be no doubt but that Patterson could have refused to accept these goods as not being ordered by him, and if so, of course defendant, as his surety, could not be held liable to plaintiff on the bill.

The difficulty is created by the fact of Patterson taking the goods and making himself liable therefor as if he had so ordered them.

The contract of defendant was to be liable, not for any limited sum, nor for any specific quantity of the goods, nor

for goods at any fixed prices, but generally for such goods as Patterson might order.

We must look at the true nature and substance of defendant's guaranty and suretyship. It was substantially to secure the payment of such goods as Patterson might buy from plaintiff, and the true question seems to be, did Patterson buy these goods while defendant's guaranty or contract as surety was in force.

We may simplify the matter by assuming that Patterson lived twenty or thirty miles from Toronto, instead of in British Columbia: that he was often in Toronto: that he sent the order in question, and that plaintiff sent these goods, and Patterson, on receipt of letter and invoice, received and used the goods, and thereby became plaintiff's debtor therefor. If, when first shipped, plaintiff had obtained (as here) defendant's draft on Patterson, say at three months, for the amount sent, and nothing was heard in the way of objection until long after the receipt of the goods, and acceptance thereof by Patterson, in such a case it would appear strange to me if the surety could claim he was discharged. I think Patterson's acceptance of the goods must be considered as equivalent to his having ordered them. The expression in his first letter as to new styles, and sending a few samples thereof, shews the terms on which they were dealing.

If defendant's argument be sound, then, even if plaintiff had telegraphed to Patterson that he had sent these goods, and explaining the variance in the order, and Patterson had telegraphed promptly back fully approving of the variance, the right to recover on the bill (taken as here) would be equally gone.

In my judgment, Patterson's accepting the goods, and thereby becoming plaintiff's debtor therefor, makes the case the same as if he had specially ordered them. It was suggested that defendant only agreed to be surety for such goods as Patterson might select as suitable for his business, and not for any larger quantities of goods that might be forced upon him. I can only say that no such

case or state of things has been attempted to be shewn. If it existed, Patterson could have been examined personally, or on commission, to prove it.

No case like this, in its facts, has been cited. It has been argued on the general principles governing the relations of principal and surety. It was not proved whether when Patterson accepted the bill in Victoria on the 28th of June, he had actually received the plaintiff's letter and invoice of June 26, nor the time usually taken for the post service from Toronto. We find his letter of April 9, speaking of plaintiff's letter of March 14, having been received. Twenty-six days elapsed between the date and the acceptance of this bill. I infer from the evidence that when he accepted, he had received the invoice. I am not prepared to hold that the surety here is discharged.

I refer on the general principle to the language of Parke, B., in *Stewart v. McKean*, 10 Ex. 689, and to Brett, L. J., in *Holme v. Brunskill*, L. R. 3 Q. B. D. 495, cited also in *Austin v. Gibson*, 4 App. R. 323: "If there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

In the present case I can see no alteration in the contract, as I understand it, and the plaintiff is, I think, entitled to our judgment.

I base this opinion on what I find on the evidence to be the substance of the contract between the parties: that it was a guaranty by defendant for such goods as Patterson should buy from him on credit: that Patterson did buy these goods and accepted the bill drawn on him therefor, knowing that the amount was in excess of his invoice, and

that defendant, as the drawer of the bill so accepted, is liable therefor. Patterson could have refused to accept the bill when presented, finding it in excess of his order, or to take the goods mentioned in the invoice of the 6th of June. Had he so refused, the plaintiff could not have recovered against the defendant as drawer. The grounds urged here would be a good defence in such a case.

I feel myself unable to agree that this case is to turn on the narrow point of the bill being drawn for other goods than were "ordered" at the moment of the drawing. I think that would be sacrificing the substance of the transaction to the form accidentally used.

CAMERON, J., [after stating the facts.]—I regret to say that upon authority I am forced to the conclusion that the defendant is discharged from liability, or rather that he has in fact never become liable to the plaintiff on the bill. He signed, as drawer, solely on account of his promise to become responsible for goods ordered by Patterson, the drawee of the bill, and it was the duty of the plaintiff to have informed him, when he was asked to put his name to it, that it covered not only the price of the goods ordered by Patterson, but the price of additional goods of a kind not ordered. He ought also, I think, to have been informed as to the price of the goods referred to by Patterson, that is, that Patterson put the tweed suits required at about \$9, and that he (plaintiff) was charging them at \$10.

The contract of the surety was, "I will be responsible for such goods as Patterson may order," not that "I will be responsible for such goods as he may order, and such also as you may send to him, and he will accept."

A person may be very willing, trusting in the discretion of another, to become responsible for such goods as he may order, while he would not be willing to incur a liability in respect of goods that the seller might send to such person unordered. The discretion in ordering might not extend to rejecting goods sent, especially if the debtor felt it to be his interest to give no cause of offence to his creditor; and

as a surety is entitled to be informed of every thing that may affect his interest, and of which he is himself to be the judge, that is in any manner at variance with the obligation he has assumed, both the fact of the difference in price of the goods ordered and the including in the amount of the bill the goods unordered should have been communicated to the defendant.

In *Holme v. Brunskill*, L. R. 3 Q. B. D. 505, Cotton, L.J., lays down the governing principle thus: "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

In the present case the question is not whether there has been an alteration in the agreement between the principals for the performance of Patterson's part whereof the defendant became responsible, but whether in the direct dealing between the plaintiff and defendant there has been that amount of equitable good faith, so to term it, that the law requires to hold the surety to his engagement. Assume that the contract of the surety had been, "I will be responsible for whatever goods Patterson should order within three months," and he had ordered

\$1,000 worth, but the plaintiff sent him \$1,500 worth, which Patterson accepted when they reached him, and the plaintiff had, on sending the goods off, presented a bill to the defendant for the \$1,500, which the defendant, in ignorance of the facts, had signed, I presume it would not be contended that the defendant in that case could be made liable on the bill for \$1,500 in the hands of the plaintiff. The plaintiff was not doing anything that would amount to moral fraud or wrong in the present case, but he failed to act in obtaining the bill from the defendant with that unreserved openness and fulness which it appears the creditor must observe in his transactions, both with his debtor and his debtor's surety, when he seeks to make the latter liable.

ARMOUR, J., concurred with CAMERON, J.

Rule discharged.

REGINA V. WEHLAN.

Certiorari—Quashing conviction.

Held, that a conviction once regularly brought into, and put upon the files of, the Court is there for all purposes; and that a defendant may move to quash it, however or at whosoever instance it may have been brought there.

Where, therefore, on an application for a *habeas corpus*, under R. S. O. ch. 70, a *certiorari* had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance.

Regina v. Levecque, 30 U. C. R. 509, distinguished.

Meek obtained a rule *nisi*, on Tuesday, 5th October, 1880, in single Court, from Galt, J., upon the application of the defendant, and upon reading the *certiorari* and the return thereto, and the information, depositions, evidence, conviction, and papers, and other proceedings attached thereto, calling upon the prosecutor and the convicting Justice to shew cause why the said conviction, which was for indecent exposure of the person, should not be quashed, upon various grounds set out in the said rule. On the return of the rule the learned Judge directed that cause should be shewn before the full Court.

The defendant was committed to the common gaol of the county of Elgin under a commitment issued by the convicting Justice upon the said conviction, which adjudged him to pay a fine and costs, therein specified, forthwith, and in default of payment adjudged the said fine and costs to be levied by distress, and in default of distress adjudged the defendant "to be imprisoned in the said gaol for fifteen days, with hard labour, exclusive of the time spent going and returning, unless the said several sums and all costs and charges of the distress shall be sooner paid."

The defendant thereupon applied for and obtained from the said learned Judge a writ of *habeas corpus*, who also directed that the said writ of *certiorari* should be issued directed to the convicting Justice, and to the Clerk of the Peace of the county of Elgin, commanding them to return

the information, depositions, evidence, conviction, orders, and proceedings, which writ was accordingly issued, and was duly returned by the convicting Justice, with the information, depositions, evidence, conviction, orders, and proceedings, according to the exigency of the said writ.

The learned Judge, upon the return of the writ of *habeas corpus*, discharged the defendant from custody, whereupon this rule to quash the said conviction was obtained.

The question involved was whether, when a *certiorari* has been issued under the *Habeas Corpus* Act (R. S. O. ch. 70), proceedings can be taken to quash without serving the magistrates with the preliminary notice and filing the recognizance.

November 24, 1880, *Cattanach* shewed cause. The *Habeas Corpus* Act does not conflict with the old statutes of 5 & 13 George II in reference to the notice and recognizance. When a return is made to a *certiorari* under our Act the papers are only before the Court, according to the Act, for the purpose of considering the propriety of discharging the prisoner. When further proceedings are contemplated, such as the quashing of the conviction, the Statutes of George II should be followed: *Regina v. Levecque*, 30 U. C. R. 509, and *Regina v. Munro*, 24 U. C. R. 44, 51. The old statutes are in force in this Province, and as they are explicit with regard to the notice and the recognizance, where ulterior proceedings are contemplated they must be followed unless our Act dispenses with them. It is true that it may be difficult, and perhaps even impossible, to shew any necessity or *a priori* reason for giving a six days' notice to the magistrate of the intention to apply for the writ, when a writ has already issued and the conviction and papers have been returned under it, and are actually before the Court. But it is not for us to find a reason. With or without reason the statutes require these conditions, and that is enough. Unless this construction would lead to a contradiction or inconsistency between the statutes effect must be given to both. The

object of requiring the notice is, to enable the magistrates to amend the conviction ; and if the magistrates cannot now amend it it is very difficult to assign an *a priori* reason for requiring the notice. But cannot they by writ of *procedendo* get the papers back, and then amend? : *Archbold's Crown Practice*, p. 189. And if this procedure is open to them, can it be said that the notice would be altogether objectless? But whether it is or is not objectless, the statutes must be followed. So far as the recognizance is concerned, it stands on a different footing. The same reason exists for having it, whether the papers have been returned or not, or whether the magistrates can amend or not, and as the reason given in the preamble of the English Act is, that the public interest requires recognizances to be given to prevent vexatious and groundless appeals, the Court has no jurisdiction to dispense with them, unless our *Habeas Corpus* Act permits this, which cannot be reasonably argued, as that Act (sec. 8) says nothing about recognizances or quashing convictions, but only refers to discharging prisoners from custody, which may occur on a bad commitment, and although the conviction may be unimpeachable.

Meek, contra, contended that the provisions of the Canadian *Habeas Corpus* Act had superseded the Imperial Statutes above mentioned. 2. That the magistrate had waived his right (if he ever had any) to notice and a recognizance, by returning the conviction. 3. That the notice required by the Imperial Statute was to enable the magistrate to shew cause against the issue of the *certiorari*, but as the *certiorari* had already issued in this case (and properly issued), and the conviction had been returned under it, the object and necessity of the notice was entirely done away with ; and that the recognizance stood or fell with the notice : that the Imperial Statute did not require a recognizance to be given on the removal of a conviction, and that the decision establishing that practice in England, (viz., *Rex v. Jenkinson*, 1 Term Rep. 82,) was delivered under a misconception of the statute and also of the power

of the Court to award costs. He contended that *Regina v. Munro* did not apply, as that was simply an application for the discharge of the prisoner, and was decided before ch. 45 of 29 & 30 Vict. was passed; and that *Regina v. Levecque* was decided on the ground that sec. 71 ch. 31 of 32 & 33 Vict., prevented the issue of a *certiorari* for any purpose, and the amended section contained in 33 Vict. ch. 27, was not passed until after the conviction had been made in that case.

December 31, 1880, ARMOUR, J.—It was conceded on the argument that the conviction could not be upheld; but it was contended that a defendant could not apply to quash a conviction returned as this one was: that the *certiorari*, in obedience to which this conviction was returned, was one directed by the learned Judge to be issued under R. S. O. ch. 70, sec. 8, merely to the end that the conviction might be viewed and considered by the Judge, and to the end that the sufficiency thereof to warrant the confinement or restraint might be determined by the Judge: that a defendant could only apply to quash a conviction when he had applied for and obtained the *certiorari* upon which it was returned, after complying with the formalities of notice and recognizance required by 13 Geo. II. ch. 18, sec. 5: that to enable this defendant to quash the conviction he must first apply to have the *certiorari* superseded, and the return taken off the files, and the conviction returned to the convicting Justice or Clerk of the Peace, and then apply for another *certiorari*, after having complied with the formalities and requisites of 13 Geo. II. ch. 18, sec. 5.

I cannot see any good reason in law why a defendant cannot move to quash a conviction on the files of this Court, brought there under a writ of *certiorari* providently and regularly issued, whether such writ was so issued at his own instance or at that of the prosecutor, Attorney-General, Judge, or Court.

The writ is the same in form at whosoever instance it

is issued. Its command is the same, to send to us in our Court of Queen's Bench, at Toronto, forthwith, all and singular the information, &c., not for any limited purpose, but for the general purpose, "that we may further cause to be done thereupon what by right and according to law we shall see fit to be done."

It is true, that the immediate object of bringing this conviction into Court was, that its sufficiency might be determined to warrant the confinement or restraint from which the defendant was seeking to be discharged under R. S. O. ch. 70 ; but there is nothing in the form of the *certiorari*, or in the statute, to warrant the contention that, when brought into Court and put upon the files, it is there for that object only, and that no other proceeding can be taken in respect of it while there.

The case of *Regina v. Levecque*, 30 U. C. R. 509, was a case in which a writ of *habeas corpus* and a writ of *certiorari* had both issued, as in this case, under the same statute ; but that case differs from this, in that the defendant there was deprived of the writ of *certiorari* by the statute under which she was convicted, whereas the defendant here is not so deprived of it.

In that case Wilson J., in delivering the judgment of the Court, upon a rule to quash the conviction and discharge the defendant, says : " We might still be obliged to consider the conviction as upon a *certiorari* issued at the common law, if we found the conviction in this Court, however brought here, so long as it was regularly here : *Regina v. Hellier*, 17 Q. B. 229 ; *Regina v. Hyde*, 16 Jur. 337." And again, in concluding the judgment : " The rule will be absolute to discharge the said Victoria Levecque altogether from custody, which is the most that can be done under the Act of 1866. I think, as the conviction is in fact here, it may be moved against, and that the conviction may be quashed, but I express no positive opinion on the point. The Chief Justice and my brother Morrison think the conviction cannot be quashed, as at the time the writ issued it could not by the Act of 1869 have been issued under it, and that the proceedings are here

merely for the purpose of determining on the legality of the restraint of liberty. The rule absolute stands for the discharge of Victoria Levecque from custody, and is now discharged as to the residue."

This case is at most, as I read it, an authority for the proposition that a defendant, who is deprived by the law under which he has been convicted of the writ of *certiorari*, cannot evade that law by taking advantage of the *certiorari* directed to be issued by the Court, or a Judge, under R. S. O. ch. 70 sec. 8, and is therefore distinguishable from the case in hand, although I must say that I agree with the view expressed by Wilson, J.

It is clear upon authority that if the prosecutor had brought this conviction into this Court under a *certiorari* obtained by him, this defendant could have made an independent application on his own behalf to quash it, although the prosecutor did not bring it into this Court for that purpose, but for a directly opposite purpose; and I fail to see any legal distinction between the right of a defendant to move to quash a conviction so brought in, and his right to move to quash a conviction brought into Court as this one was.

It is the fact of the conviction being on the files of this Court, regularly brought there, that gives the right to move to quash it; how, or at whose instance it was brought there, as long as it was brought there regularly, cannot, in my opinion, affect that right.

I do not see any ground upon which the defendant could apply to quash or supersede the writ of *certiorari*, for it was providently and regularly issued, and if he could not, he would be without remedy for his illegal imprisonment.

The distinction between this case and that of *Regina v. McAllen* (*post*, p. 402), is, that in this case the *certiorari* was rightly before the Court, and in that case wrongly.

In my opinion the rule should be absolute to quash the conviction.

HAGARTY, C. J., and CAMERON, J., concurred.

REGINA V. MCALLAN.

Motion to quash conviction—Objections to certiorari.

In showing cause to a rule *nisi* to quash a conviction, objection may be taken to the regularity of the *certiorari*, and a separate application to supersede it need not be made.

Where, therefore, on an application made after notice to the convicting justices for a rule for a *certiorari* the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was

Held, affirming the decision of GALT, J., that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the *certiorari* was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged.

CAMERON, J., dissented, being of opinion that a substantive motion should be made to quash the writ of *certiorari*; and that the conviction being before the Court under a writ of *certiorari* unsuperseded, the validity of the conviction should be inquired into.

THIS was an appeal from a judgment of Galt, J., in single Court, discharging a rule *nisi* granted in that Court before him to quash a conviction of the defendant, made by two Justices in the county of Wellington, for selling goods without license, contrary to a by-law with respect to transient traders, passed under R. S. O. ch. 174, sec. 466, sub-sec. 53, and directing a *supersedeas* of the *certiorari* under which the conviction was brought into this Court.

Application was made on behalf of the defendant to Osler, J., for a rule for a *certiorari* to bring up the said conviction, on the 15th day of June, 1880, after six days notice to the convicting Justices that an application for that purpose would be made by the defendant to the presiding Judge in open Court, at Osgoode Hall, in the city of Toronto, on that day, which application was refused.

The convicting Justices did not appear upon this application, nor did their attorney, who swore that he did not appear to oppose the application, because he did not consider the grounds were sufficient, and thought the writ asked for would not be granted.

On the 10th of June, 1880, in anticipation that the writ would be granted, the defendant entered into a recogni-

zance, with two sureties, in the sum of \$250, before a Justice of the Peace of the county of York, conditioned to prosecute with effect and without any wilful or affected delay, at his own proper costs and charges, a writ of *certiorari*, issued out of Her Majesty's Court of Queen's Bench at Toronto, to remove, &c.

Subsequent to the refusal of the said application, and on the 31st of August, 1880, another application was made on behalf of the defendant, upon the same materials used upon the previous application, for a rule for a *certiorari* to bring up the said conviction, and a rule for that purpose was obtained *ex parte* in the single Court before the Chief Justice of the Common Pleas, no notice of such last mentioned application having been given to the convicting Justices.

A writ of *certiorari* was accordingly issued on the 1st of September, 1880, directed to the convicting Justices and to the Clerk of the Peace of the county of Wellington, commanding them to return the said conviction, which was accordingly done by the Clerk of the Peace.

No further or other recognizance than that above mentioned was entered into by the defendant.

Thereupon the said rule *nisi* was obtained to quash the said conviction, upon shewing cause to which counsel objected that no notice of the application for the *certiorari* had been given to the convicting Justices, and that no sufficient recognizance had been entered into by the defendant. The learned Judge held that these objections were entitled to prevail.

November 19, 1880. *McMichael*, Q. C., and *Ogden*, for the appeal. The appeal should be allowed, and the conviction quashed, inasmuch as the magistrates, having failed to attend on the 15th day of June, were not entitled to any further notice. The application to the Chief Justice was by way of appeal from *Osler*, J., and no notice was required: *Kidd v. O'Connor*, 43 U. C. R. 193; *Bennett v. Benham*, 15 C. B. N. S. 616; *Re Allen*, 31 U. C. R. 479-80.

The magistrates, by accepting the writ and returning the papers in obedience thereto, and by the acceptance of the rule to quash the conviction, and the enlargement before Galt, J., and not having moved to quash the *certiorari*, and by proceeding so far with the argument before him without raising the objections, have waived all right to take the objections, and should not now be heard upon them: See "Anon." 1 Chit. 129; *Hornpay v. Kenning*, 2 Chit. 236, 240; *Pearson v. Rawlings*, 1 East, 78; *Fletcher v. Wells*, 6 Taunt. 191; *Reg. v. Dunn*, 8 T. R. 217-8; *Regina v. Hoggard*, 30 U. C. R. 152; *Reg. v. Frawley*, 45 U. C. R. 227. The case of *Regina v. Peterman*, 23 U. C. R. 576, is distinguishable from this, as in that case the rule *nisi* to quash this conviction had not been served. As to the recognizance, it is sufficient and properly taken. 5 Geo. III. ch. 19, secs. 1 & 2, do not apply to motions for *certiorari* in cases of conviction. They only apply to orders of Sessions: See *Rex v. Jenkinson*, 1 T. R. 82. This being so, the recognizance is only required by the discretion of the Court, and the form and manner of taking it are matters of discretion; and the recognizance in this case being in proper form, and taken before a Justice of the Peace within his own county, is sufficient. The act of the magistrate, being ministerial, is binding. Recognizances are not, in this Province, required to be signed by sureties: See form in *Harrison's Municipal Manual*, page 986; 32 & 33 Vic. cap. 31, sec. 65, D., form, page 380. The conviction in this cause being unquestionably bad, there can be no reason for requiring a better recognizance, for the magistrates would not be entitled to costs. If it is necessary, the Court will enlarge the matter for a better recognizance to be put in: *Regina v. Dunn*; see also *Rex v. Inhabitants of Abergele*, 5 A. & E. 795. The conviction is bad for not shewing the day when, or the place where the offence was committed, neither does it shew that the goods were not a portion of an insolvent estate.

Cattanach, contra. After renewing the objections taken before Galt, J., that McAllan had not given preliminary

notice to the magistrates before moving for the *certiorari*, and had not given a proper recognizance as required by law, and also that the document purporting to be a recognizance was effete:—Two things are indispensable before a conviction can be quashed. Six days notice of the intention to apply for a *certiorari* must be given before the application can be made; and no proceedings to quash the conviction can be taken until a recognizance, taken before a magistrate or the Justices in session, of the county in which the conviction took place, or a Superior Court Judge, is given: See *Paley* on Convictions, 5th ed., pp. 416, 419, 420, 438. The statutes of George, viz., 5 Geo. II. ch. 19, and 13 Geo. II. ch. 18, there referred to, are in force in this country, modified only by the Habeas Corpus Act (R. S. O. ch. 70). In this case no notice was given excepting the notice of the rule; and the recognizance was taken before a Justice of the Peace of the county of York. Besides, the recognizance, although entered into before the issuing of the writ, referred to it as a writ issued, or that had been issued, and therefore the recognizance, although otherwise good, would be invalid on its face *quoad* the writ in question. These objections can be raised at any time before the rule is made absolute; and it is not necessary to make a substantive application to set aside the writ or recognizance. In fact, the objection of want of notice can be taken after the rule is made absolute: *Paley* on Convictions, p. 419; *Regina v. Peterman*, 23 U. C. R. 516; *Archbold's Crown Practice*, p. 189. It is argued that the magistrates have waived these objections by making a return under the writ; but a reference to the record shews that the return was made by the Clerk of the Peace; and besides, there are public reasons given in the statute for these forms, which will not permit of the argument of waiver.

December 31, 1880. ARMOUR, J.—The 13 Geo. II. ch. 18, sec. 5, provides that no writ of *certiorari* shall thenceforth be granted, issued forth, or allowed, to remove any

conviction, order, &c., made by or before any Justice or Justices of the Peace or the General Quarter Sessions, unless such *certiorari* shall be moved or applied for within six calendar months next after such conviction, order, &c., and unless it be duly proved upon oath that the party suing out the same hath given six days notice thereof in writing to the Justice or Justices, or any two of them (if so many there be), by and before whom such conviction, order, &c., shall be so made, to the end that such Justice or the parties therein concerned may shew cause against the issuing or granting of such *certiorari*.

It is impossible to hold that the notice given of the application made on the 15th of June, dispensed with, or served for notice of the application made on the 31st of August.

The statute imperatively requires that such notice shall be given, and makes the giving of it a condition precedent to the issuing of the writ; and I do not think that the convicting Justices were under the circumstances driven to make an independent application to quash the *certiorari* for the want of such notice, but that they could set it up in answer to the rule *nisi* obtained by the defendant to quash the conviction.

Nor do I think that the convicting Justices were by any conduct on their part precluded from setting it up.

Had the objection been confined to the insufficiency of the recognizance alone, that might have been got over, as was done in *Rex v. The Inhabitants of Abergele*, 5 A. & E. 795, but the want of the notice could in no way be cured.

In my opinion, therefore, the decision of my brother Galt should be affirmed, with costs.

HAGARTY, C. J.—The point is reduced to this; in shewing cause against a rule to quash a conviction, can objections be taken to the regularity of the *certiorari* in its allowance or issue, or can it only be attacked on a motion to quash it? As far as I can ascertain, the point was not taken before my brother Galt, but now appears for the first time.

I find no direct decision on the point. I find many motions to quash, and also cases in which objections have been taken and allowed on shewing cause to the rule to quash the conviction.

If there be no inflexible rule or practice, it seems unwise to insist on a separate motion to quash the *certiorari* when the objection to it is clear.

The Courts have certainly allowed the objections to prevail on the motion to quash the conviction, where it appeared that the *certiorari* had been taken away, as in *Rex v. Micklethwayte*, 4 Burr. 2522, even in cases where a case had been stated by consent from the Sessions.

Regina v. Levecque, 30 U. C. R. 509, seems to recognize the same rule.

In *Rex v. Wakefield*, 1 Burr. 489, on a motion to quash an order of Justices, and the order of Sessions confirming it, the Court referred to the affidavits made for obtaining the *certiorari* and the affidavits used in opposing it, and after much debate the Court, on the merits, ordered the *certiorari* to be superseded, as having issued improvidently, and the return to be taken off the file. The Justices had made an order which they could not have made if the title had come in question. Lord Mansfield and the Court held that the title was not really in question, though the defendants urged it was. "We are all opinion (he says) that the rule for the *certiorari* having been made absolute, and the return thereto having been filed, ought not now to stand in the way and prevent our coming at the real justice and merits of the case; or, if the *certiorari* issued *improvide*, we can order it to be superseded and the return to be taken off the file."

It was apparently under an Act which directed that the proceedings should not be removed into any other Court, unless the title should be in question. The report of this case in 2 Kenyon, 168, still more clearly shews that the Court dealt with and set aside the *certiorari* without special motion against it. It had issued after opposition to it. Lord Mansfield says, (p. 170): "The only objection

then is as to the form of procedure now, as the writ is brought up and the return filed; but I have no doubt at all upon that, as we are warranted by many precedents to supersede the writ *quia improvide emanavit*," &c.

In *Regina v. Hoggard*, 30 U. C. R. 156, on motion to quash the conviction, Richards, C. J., says, (in answer to an objection that the recognizance was not sufficient, a mistake being made in stating the 32nd instead of the 33rd year of the Queen's reign): "Where there has been some omission, the proper course seems to be, to move to quash the writ or the allowance of it, and not to shew the defect as cause against quashing a bad conviction. When the objection is to some irregularity in obtaining the allowance of the *certiorari*, or to the issue of the writ itself, if moved against as a substantive matter, the Court might give an opportunity to amend; but if urged against quashing a bad conviction, no such opportunity is afforded." After noticing the slightness of the objection, he says: "If not more formidable than it appears to me now, I should say that the objection to it cannot, according to the practice, be taken at this stage of the proceedings."

In *Regina v. Peterman*, 23 U. C. R. 516, a conviction before a Justice of the Peace was affirmed by the Sessions, and removed by *certiorari* after notice to the complainant and the Justices in Session. On motion to quash the conviction, it was objected that the convicting Justice had received no notice either of the application for *certiorari*, or of the rule to quash.

The Court held that whatever might be the practice in England, it was proper in such a case as the present to see that the convicting magistrate was apprised of the proceedings, inasmuch as he was exposed to an action if the conviction should be quashed. The rule *nisi* was discharged, with costs.

Now, if it be an inflexible rule that the *certiorari* must stand unless specially moved against, I do not see how some of these cases can be supported. The two cases in Burrow's Reports shew a different practice. Either the *certiorari*

bringing all the proceedings before the Court must stand, unless specially moved against, or the counsel supporting the conviction so brought before the Court must be allowed to state any substantial objection to its issue, such as that *certiorari* in such a case had been expressly taken away, or that notice to the convicting Justices under the Imperial Statute had not been given.

Such a mere technicality as that noticed by Richards, C.J., as a mistake in the recognizance as to the year of the Queen's reign, might be well left to an express motion, when the Court, in furtherance of justice, might allow an amendment.

As I find no inflexible rule laid down on the subject, I do not feel warranted in holding that the Justices here, who did not receive the proper notice of the application for *certiorari*, should be driven to the extra expense of an independent motion to quash the *certiorari* as soon as they were served with the rule *nisi* to quash the conviction.

I look upon the absence of the statutable notice as a most substantial defect, and I think it is still open to them to urge it.

CAMERON, J.—The rule to quash the conviction should, in my judgment, be made absolute, as the conviction is admittedly bad and cannot be upheld.

On the motion before the Court, the question as to whether the *certiorari* improvidently issued has no place. To raise that question, in my judgment, a substantive motion should have been made to quash the writ of *certiorari*. The writ upon its face is regular. It and the return to it were filed before the rule to shew cause why the conviction should not be quashed was issued.

I do not see, therefore, how it is material to the question to be decided to determine whether a notice has been served or has not been served, or anything else has been omitted to make the issuing of the writ of *certiorari* regular. The party complaining of the conviction comes unprepared with materials to support the regularity of the

writ of *certiorari*, except in so far as to shew that the case is one wherein the right to *certiorari* has not been taken away by statute; in which case the conviction is clearly not properly before the Court, and the Court of its own mere motion may direct it to be superseded and the conviction returned to the Justices of the Peace to be enforced, instead of keeping it in the Court and enforcing it there. The case of *Rex v. Micklethwayte*, 4 Burr. 2522, was of this character.

The case of *Regina v. Peterman*, 23 U. C. R. 516, only shews that the Justice whose conviction has been removed is entitled to be called on to shew cause why it should not be quashed before it can be quashed.

In *Regina v. Levecque*, 30 U. C. R. 509, the present Chief Justice of the Common Pleas was of opinion, without formally so deciding, that the conviction being before the Court, it might be moved against and quashed, while the other members of the Court, Richards, C. J., and Morrison, J., thought otherwise, as the writ of *certiorari* could not have been issued under the Act there in question.

In *Regina v. Hoggard*, 30 U. C. R. 152, Richards, C. J., said: "Where the *certiorari* has been issued, and there has been some omission, the proper course seems to be, to move to quash the writ or the allowance of it, and not to shew the defect as cause against quashing a bad conviction." It has been the practice in the Courts of this country so to move—see *Regina v. Flannigan*, 9 U. C. L.—J. N. S. 237—and in England.

If the conviction is bad, as it is conceded to have been, the justice of the case is entirely against yielding to the objection of want of notice on this rule. On a rule to quash the *certiorari*, as that would be against the proceeding in which the vice occurred, it should have weight. Though the statute requires notice to be given six days before a motion for a *certiorari* to remove a conviction is made, as far as the Justice of the Peace making it is concerned, it is of very little use, as he is served with a rule to shew cause why the conviction should not be quashed,

and thus has the opportunity of protecting his individual rights, and nothing affecting them is done without notice behind his back.

My learned brothers in this Term, in *Regina v. Wehlan*, ante p. 396, have decided that where a *certiorari* has been granted in aid of a writ of *habeas corpus*, the writ is properly before the Court, and a conviction returned under it may be quashed, notwithstanding notice of an intention to apply for the writ had not been given, on the ground that the issuing of the writ in that case was the act of the Judge and not the convicted party. The notice is what the Justice is concerned in, that the application will be made for the *certiorari*, and it is no consequence to him whether it has been issued in aid of a *habeas corpus* or on an application of the defendant purely with a view of quashing the conviction. I concur in that judgment, but on the broader ground that the conviction being before the Court under a writ of *certiorari* unsuperseded, the Court has a right to determine whether the conviction is bad or not, and if bad to quash it.

The alleged defect in the recognizance is, if the conviction were otherwise properly before the Court, of no importance, as the convicting Justice would not be entitled to costs, the conviction being bad.

Judgment affirmed.

CAMPBELL V. THE VICTORIA MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Misrepresentation—Incendiarism.

Action on a fire policy, dated 21st May, 1879, on the ordinary contents of a barn, which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east half of the lot, the plaintiff's homestead and home buildings being on the west half, some distance across the road. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No" to the question, "Is there reason to fear incendiarism, or has any threat been made?" On the same day the plaintiff had obtained another policy from defendants on his dwelling house and home buildings, the same question and answer being contained in his application therefor; and the thresher and reaper in question were then in the home buildings. The fire occurred on the 28th October, 1879.

At the trial it appeared that one M., the plaintiff's hired man, about the 8th May had threatened to beat the plaintiff, and the latter, who was a nervous timid man, being alarmed, had had the premises insured: that he had sat up and watched for a night, and that he believed the premises had been set on fire. He denied having any reason for fear, except as to his home buildings. At the time of the fire the barn contained some grain and hay, and the threshing and reaping machine, for the loss of which this action was brought. One of the conditions on the policy was, that if the assured misrepresented or omitted to communicate any circumstance material to be made known to the company, in order to enable them to judge of the risk, the policy would be avoided.

Held, ARMOUR, J., dissenting, that the plaintiff could not recover, for the plaintiff having admitted his own belief in the danger and acted upon it, his answer to the above question was untrue.

Per CAMERON, J.—The question was equivalent to "Have you reason to fear, or do you fear, incendiarism?" and, though the bodily threat did not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the insurance was effected on account of such fear, there was a clear misrepresentation in answering the question; and it made no difference that the property to be covered by the policy was not yet in existence.

Per ARMOUR, J.—The word "incendiarism" commonly applies to buildings only, and should not be extended in this case to cover personal property. The question should be construed strictly with reference to some particular ground of fear, otherwise the answer "No" referring to the first part only, viz.: "Is there reason to fear incendiarism?" would be in every instance untrue; for every insurance is effected because the assured fears the happening of fire by accident, neglect, or design. And the evidence in this case shewed that there was no such reason as, operating on the minds of a majority of prudent men, would cause them to fear incendiarism; and therefore the question was truly answered. The question was also properly answered as to the property covered by this policy, for the fear extended only to the home property; and as to the property intended to be covered by the policy but not then in existence, such as the crops, as to which no fear could exist.

DECLARATION on a fire policy for three years, covering \$1,025 on the ordinary contents of a barn, \$75 on a reaping machine, and \$100 on a threshing machine.

The defence arose on the fifth, sixth, and seventh pleas, setting out a concealment of a material fact in answer to certain questions as to whether there was any reason to fear incendiarism, or had any threat been made.

The case was tried at the last Fall Assizes, at Barrie, before Osler, J., without a jury, and a verdict rendered for the plaintiff.

A written application for the insurance was put in, containing a number of questions, with the applicant's answers. Among others was:

No. 20. "Is there reason to fear incendiarism, or has any threat been made?" Answer, "No."

At the foot, above the plaintiff's signature, it was declared "that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same is known to me and are material to the risk; and I hereby consent and agree that the same shall be held to form the basis of the liability of the said company."

This was dated 13th May, 1879. The policy issued thereon on the 21st of May, 1879. It contained the statutory conditions, and "variations;" the first statutory condition avoiding the policy if the assured "misrepresents or omits to communicate any circumstance which is material to made known to the company, in order to enable it to judge of the risk it undertakes."

On the same day the plaintiff took out another policy from the same company for \$2,000 on his dwelling house, furniture, barn, and other buildings, the same application being made, and same question and answer being contained in it as in the first.

This latter policy was not in question in this action, the loss being wholly on the first.

The barn there insured was on a piece of land leased by

the plaintiff, some distance across the road between it and the plaintiff's homestead and home buildings. The plaintiff owned and lived on the west half and leased the east half.

The fire occurred on the 28th of October, 1879, the cause, according to the claim papers, being unknown. A quantity of wheat, oats, and hay was destroyed in the barn.

At the time of the insurance the barn was empty, and the threshing machine and reaper were in the homestead buildings. The machine remained there till the fall. The plaintiff said that at the time of the insurance he had no expectation of putting anything in the rented barn till the winter, and he had no reason at all to fear incendiarism as to the rented place.

After the fire the agent and president of the defendants' company waited on the plaintiff to make enquiries. Mills, the president of the company, who was examined, said that he took down the plaintiff's statement in writing, which was produced. The substance of his evidence and the written statement was, that the plaintiff stated that the building must have been set on fire: that he had a difficulty with one McCabe, who threatened to beat him: that he was alarmed, and sent for Scroggie, the agent, to get the premises insured; and that he would not have insured but on account of being afraid of McCabe, and that he had sat up and watched for a week.

The plaintiff himself told of his quarrel with McCabe, his hired servant, and of the latter's threats to beat him, on or about the 8th of May. He said: "I was a little alarmed about my home property. I thought him or some person else might set it on fire. The straw was dry in the barn yard, and a match would very soon set it going. I had no reason to suspect any one else; but he might get somebody. In consequence of that I sat up awhile of a night. I commenced sitting up the night he threatened to have the fight with us. That was the night of the 8th of May."

He said he only sat up one night. His account as to his

reason for insuring was not very clear. In one place he said that he might not have insured, but that the agent came along. He said he did not understand the question as to fear of incendiarism, and that he was nervous and confused when Mills examined him. He denied saying he had sent for the agent, or that he had watched for a week, or would not have insured, but for McCabe; but his examination as to this statement was very unsatisfactory. He admitted that it was his opinion that it was set on fire, and that it was not an accident.

The applications were signed on the 13th of May, and the agent said he went to the plaintiff's place in consequence of a message from the Campbells.

The plaintiff's wife swore she heard him say he was in a little dread of McCabe setting fire to his property.

The defendants' president swore that they considered it very material to know if there were any reasons to dread incendiarism, and that they would certainly have refused the risk if the plaintiff had, on his application, told them what he afterwards admitted.

After reserving judgment, the learned Judge found as follows :

"The question which the defendants contend has been answered falsely, is the following :—'Is there reason to fear incendiarism, or has any threat been made?' The threat referred to must be taken to mean what is sometimes called an incendiary threat. The defendants rely upon the fact that a few days before the application the plaintiff and his hired man had a quarrel, in the course of which the latter threatened to beat the plaintiff and his sons, who were present, and that in consequence of this quarrel the plaintiff, who appears to be a man of a nervous, timid disposition, determined to effect the insurance in question earlier than he otherwise would have done. There was no other threat or quarrel, nor is there evidence that the man remained in the neighbourhood, or that the fire—which occurred upwards of six months afterwards—was caused by him.

"Since the trial I have read the judgment of the Court of Appeal in the case of *Greet v. Citizens Insurance Co.* I do not think that it is by any means conclusive in the defendants' favour. The facts are entirely different. In-

cendary threats had in fact been made by a known person, and an anonymous letter of the same nature had been received. These were facts which no prudent man could disregard. They, in fact, influenced the conduct of the insured, and the premises were burned soon after the policy was issued.

"In the present case the cause for the quarrel seems to have been removed; for it is said the hired man got his trunk, of which the plaintiff had retained possession, and although the plaintiff did watch the homestead buildings part of the night after the quarrel, and did insure sooner than he would otherwise have done in consequence of it, I think there was nothing in what had occurred which, to use the language of the Court of Appeal, would give to a plain man of ordinary common sense reason for believing in the existence of danger.

"If the fact that the plaintiff insured because he without reason apprehended danger, is to be a defence for this company, it must be so declared by the full Court. I find that the pleas are not proved, and enter a verdict for the plaintiff for the loss proved, \$400, and interest \$16—\$416."

November 18, 1880. *McCarthy*, Q. C., obtained a rule *nisi* to enter a verdict for defendants, because the evidence established the truth of the fifth plea; and because the Judge erred in holding that the case turned, not merely upon what the plaintiff thought as to the danger of incendiarism, but upon whether in fact, irrespective of plaintiff's belief, there was danger to be feared; and because the evidence established there was danger of the kind to be feared from McCabe with whom the plaintiff had quarrelled, in consequence of which the plaintiff effected the insurance with the defendants.

November 30, 1880. *Lount*, Q. C., shewed cause. The plea is not on a warranty, and therefore does not require the same strictness as if there were one. If the plaintiff answered the questions falsely, it could only apply to his own property, for when menaced by McCabe, he sat up and watched his own buildings. If the threat meant anything, his answer shewed the only incendiarism he feared was as regarded his own property, not the property burned; his

answer, therefore, was truthful: *Greet v. Citizens' Ins. Co.*, 27 Gr. 121; *Herbert v. Mercantile Ins. Co.*, 43 U. C. R. 390. McCabe's threat was not such as to make an ordinary person fear incendiarism: *Angell on Fire and Life Insurance*, 232, 242.

McCarthy, Q. C., contra. If the threat was material, as it is, the company should have been made aware of it. This is the general rule, unless the insurer has agreed to waive it: *Bunyan on Fire Insurance*, 58, 59, 60. The English cases shew that if a neighbour is menaced, and if the burning of his property would endanger mine, I am bound to communicate the threat: *Bufe v. Turner*, 6 Taunt. 338; *North American Ins. Co. v. Throop*, 22 Mich. 167; *Lindenau v. Desborough*, 8 B. & C. 586; *Wainwright v. Bland*, 1 M. & W. 32. It will not do for the plaintiff, having acted as he did, (sat up and watched), now to say that the threat was not a material fact unnecessary to have been disclosed. There was a reasonable dread in his mind that he would be burnt out, and he should have informed the defendants of the threat: *Wood on Fire Insurance*, secs. 200, 201.

December 31, 1880. HAGARTY, C. J.—It seems to me, on the evidence, the clear conclusion of fact must be, that the plaintiff was alarmed by the threats and conduct of McCabe, and dreaded incendiarism on his part, and sat up at night to guard or watch his property in consequence thereof, and, as another consequence, effected these insurances.

The case does not in any way depend on the believing or disbelieving one witness in preference to another, or on the demeanour or conduct of witnesses, between whom a jury or presiding Judge would naturally be the best to discriminate. There is no real conflict of testimony.

I am unable, after the fullest consideration, to accept the view of my brother Osler.

I can fully understand the view that threats may be made to a man of an ordinarily vigorous mind, which he may utterly disregard as absurd or unworthy of notice, and that his non-communication of them, when effecting an

insurance, at least, in the absence of any direct questioning, may not come within the first statutory condition.

There was here no threat of incendiarism; it was a threat of personal violence. If the plaintiff either treated it with contempt, or as in no way bearing on incendiarism, I can understand his answering the company's question in the negative; but when he is asked, "Is there any reason to fear incendiarism, or has any threat been made?" he answers, "No," and at the same time is shewing his own direct dread thereof, his watching against it and desiring to insure in consequence thereof, and finally, when the loss occurs, declares that he believes it was the work of an incendiary. Can a man himself believe in a state of circumstances and act thereon, and afterwards urge that, although he believed in them, a man of ordinary firmness would not so believe?

I think the defendants have a clear legal right to say that any dread of specific incendiarism existing in the mind of the person proposing to insure, and influencing his conduct, should not be withheld from them, if not on the statutory condition, certainly not on the pointed interrogatory.

I think the language of Moss, C. J., in the recent case in Appeal, *Greet v. Citizens' Ins. Co. et al.*, 5 App. R. 596, is very much in point to the case before us, and seems to me fully in accord with the views I am now endeavouring to express.

It is urged that his dread only extended to his homestead buildings, and not to the barn on the east half; but there was nothing then in the barn, nor for months afterwards, and the only existing property included in the application for the policy now in question was at the time of insurance in the buildings about his homestead; so that in fact the only goods to which the insurance could then apply were in the premises to which his apprehension extended.

It is also urged that a threshing machine and a reaper were not property as to which he could have any reasonable dread.

This distinction, if it be one, is rather too subtle for me, and cannot enter into my disposal of the present case. This article was subsequently burned and claimed for.

Nor am I impressed with the argument that, as all his apprehensions were confined to the homestead premises, he feared nothing as to the barn. If he really feared incendiarism from McCabe, it is not easy to see why the latter might not even more readily and at less risk set fire to the distant barn. There was nothing then in it, and the building did not belong to the plaintiff, but the insurance was made on its future contents.

I must arrive at the conclusion that the plaintiff cannot recover.

This case was formerly before Cameron, J., and a jury, but the latter were unable to agree.

ARMOUR, J.—I agree with the learned Judge who tried this cause, that the verdict ought to be for the plaintiff, and am therefore obliged to dissent from the views of the majority of this Court. And in order that I may make my views intelligible, I must necessarily advert to the facts established at the trial, so far as requisite to that end.

The plaintiff was the owner of the west half of lot 24, in the 10th concession of Essa, his dwelling house and buildings being on that side of his land nearest the 10th concession road; he was also the lessee of one Fletcher, the owner thereof, of the east half of lot 24, 10th concession, Essa, on the side of which, nearest to the 11th concession road, were the buildings, consisting of a frame barn, a log barn, and a log house.

On the 13th of May, 1879, the plaintiff signed two applications for insurance in the defendants' company, on their usual printed forms supplied to their agents; the first, for insurance on dwelling house, on ordinary contents therein, on barn No. 1, on No. 2 cow stable, on stable and sheds, and on ordinary contents therein of above out-buildings; and the second, for insurance on ordinary contents of barn No. 1, on reaping machine, and on threshing

machine. The last mentioned barn was on the east half of the lot, and there were no "contents" in it at the time, and he evidently intended insuring the reaper and thresher as being, and where they should be, on the east half, as he usually kept them in the barn on the east half during the winter. They were, however, on the west half of the lot, the one in the shed and the other in the barn, at the time of the application.

Upon each of these applications the defendants issued a policy of insurance to the plaintiff, and in my view these policies must be looked upon as separate and distinct insurances; and it is of the utmost importance that this should not be lost sight of, otherwise there is sure to arise confusion of mind in dealing with the question for determination.

On the 28th of October, 1879, the barn on the east half of the lot was destroyed by fire, together with its then contents, consisting of fall and spring wheat, peas, oats, hay, and the threshing machine, and it is for the loss covered by the policy of insurance upon these contents and the threshing machine that this action is brought.

The defence is altogether founded upon what is alleged to be an untrue answer to a part of a question put to the applicant in the application, "Is there reason to fear incendiarism?" The whole question is, "Is there reason to fear incendiarism, or has any threat been made?" to which the applicant answered "No;" but we are not troubled with the latter part of the question, "or has any threat been made?" because it is not set up or contended that the answer "No" was an untrue answer, so far as that part of the question was concerned; but it is set up and contended that the answer "No" was an untrue answer to that part of the question, "Is there reason to fear incendiarism?"

The first question that presents itself upon reading the application is, what is the meaning of the word incendiarism, as used in the question asked, and is the question asked with reference to personal property at all? The Imperial Dictionary defines its meaning to

be the act or practice of maliciously setting fire to buildings, and in the ordinary acceptation of the word and its ordinary and common use it is never applied to to personal property, but solely to buildings. Was it intended that it should have a different meaning in this application? The application is framed for the insurance of both buildings and personal property, and the questions asked of the applicant are all applicable to buildings, and none to personal property only. Provision is made in the application for insuring live stock under the contents of outbuildings, and to this class of personal property the word incendiarism is wholly inapplicable; and I am unable, after carefully reading and considering this application, to come to any other conclusion than that the question asked is not asked with reference to the personal property, but with reference to the buildings only, and that this application being for insurance on personal property only, the question asked is, with reference to it, meaningless, and the answer to it immaterial.

Assuming, however, that the question is applicable to personal property, I understand the question to be asked with reference to the property sought to be insured, and it does not, in my opinion, refer to any other property of the applicant not sought to be insured, situate it may be on the same lot, or on a different lot, or in a different part of the country, or in a different country. There may be good reason to fear incendiarism as to one part of a man's property, and no reason to fear it as to another part, and this may arise from the difference in the situation of the parts, or from their difference in quality and kind; and it would be monstrous to hold that if he insured the part in respect of which there was no reason to fear incendiarism, on the statement that there was no reason to fear it, he should lose his insurance on that part because there was good reason to fear incendiarism as to the other part; and to hold so would be equally monstrous whether such other part was uninsured, or insured in another or in the same company by a policy effected at the same or at a different

time, and upon a false statement that there was no reason to fear incendiarism, when in truth there was.

In my opinion the question must be construed as if it read "Is there reason to fear incendiarism to the property sought to be insured?"

Assuming this to be so, what is the proper meaning to be attached to the question? Every person who insures his buildings against fire in a company constituted for the purpose for which the defendants' company is constituted, insures against fire happening by accident, by neglect, and by design.

Every person therefore insures because he fears that fire will happen by accident, by neglect, and by design. And because common experience teaches that fire will happen by accident, by neglect, and by design, therefore every person who insures against fire does so because he has reason to fear fire happening by accident, by neglect, and by design.

And so in one sense of the language of the question, "Is there reason to fear incendiarism" (or fire happening by design) every person applying to insure in the defendants' company who answers "No" to that question, *ipso facto* forfeits the insurance he is applying to effect.

But this is a sense in which it would be unjust and unreasonable to construe it.

The reason to fear incendiarism referred to in the question must be some special reason to fear it, over and beyond that general reason to fear it which every person who insures has, and to which I have above adverted.

It might be such a reason as would not operate on the mind of the applicant so as to cause him to fear incendiarism, and yet it might be a reason to fear incendiarism within the meaning of the question.

So also it might be such a reason as would operate on the mind of the applicant, so as to move him to fear incendiarism, and yet it might not be a reason to fear incendiarism within the meaning of the question.

For the question addressed to the applicant is not, Have

you reason to fear incendiarism? but, Is there reason to fear incendiarism?

The proper meaning to be attached to the question, in my view, is, is there any such reason as operating on the minds of a majority of men of ordinary prudence and intelligence would cause them to fear incendiarism?

The question addressed to the applicant in the case of *Greet v. Citizens' Ins. Co.*, was: "Incendiarism: Have you reason to believe that your property is in danger from incendiaries?" Much, therefore, that is said by the Court of Appeal in that case is, owing to the difference in the question, inapplicable to this case; but so far as what was said in that case is applicable to this case, it entirely supports the view I have taken.

The learned Judge who tried this case reports to us that the plaintiff is an extremely nervous and timid man, and one easily alarmed, and every act of his disclosed by the evidence shews him to be a man far below the average of ordinary prudence and intelligence.

Having regard to the question asked in this case, Is there reason to fear incendiarism? if we are to hold, because the applicant in this case absurdly felt reason to fear incendiarism, when no such reason existed, that therefore there was reason to fear incendiarism within the meaning of the question, we must equally hold where an applicant absurdly feels no reason to fear incendiarism when such reason does exist, that therefore there was no reason to fear incendiarism within the meaning of the question. This will be the logical effect of doing as is sought to be done in this case, of turning the question asked, Is there reason to fear incendiarism? into the question, Have you reason to fear incendiarism?

The question that, in my view, was the proper question to be submitted to a jury in this case, and consequently the question of fact to be determined by me, is, was there at the time the plaintiff signed the application for the policy of insurance upon which this action is brought, such reason existing as, operating upon the minds of a

majority of men of ordinary prudence and intelligence, would have caused them to fear incendiarism to the property sought to be insured by that application ?

We have the certificate of the defendants' agent that there was no prevalence of incendiarism in the neighbourhood. There is no evidence of any threat or insinuation of incendiarism to the plaintiff's property. The only basis for the plaintiff's reason to fear incendiarism was, that a man named McCabe had threatened to beat him with a club. Men who have the courage to threaten others to their faces with personal violence, are not the men who have the cowardice to go behind their backs, and burn down their buildings.

I confess I am open to the charge of being too subtle to draw the conclusion that because A. threatens to beat B. with a club, he therefore threatens to burn B.'s building. Such a deduction, speaking for myself alone, is a severe strain upon judicial gravity.

Assuming, however, that it was a proper conclusion for the plaintiff to draw, there is no evidence whatever that he drew any such conclusion with respect to the property mentioned in the application for the policy of insurance upon which this action is brought.

The crop contents of the barn were not in existence at the time the application was made, and he swears positively that he had no reason to fear incendiarism to the property on the east half of the lot. As to the rest of the property mentioned in the application, the mowing and threshing machines, there is no evidence whatever that he had reason to fear, or did fear incendiarism to them; indeed, it would be difficult to find evidence that any man, sane or insane, ever did or could have reason to fear, or ever did or could fear incendiarism to articles so incombustible in their nature.

I must answer the question for my determination in the negative. See *Ashford v. Victoria Mutual Ins. Co.*, 20 C. P. 434; *Angell on Fire Insurance*, 242.

CAMERON, J.—I concur in the opinion expressed by the learned Chief Justice, and think there ought to be a verdict entered for the defendants by reason of the plaintiff's untrue answer to the question, "Is there reason to fear incendiarism, or has any threat been made?"

It appears to me the evidence leads unmistakably to the conclusion that it was by reason of the difficulty the plaintiff had with McCabe, his servant, that at that particular time he became desirous of effecting an insurance with the defendants; and although a threat to beat or strike another, assuming the threat went no further, may not be in itself a valid reason for believing the person threatening intends to set fire to the other's premises, still, if that other, in consequence of the threat, watches his premises at night to prevent them from being maliciously burnt, and immediately sends for an insurance agent, as I conclude from the evidence this plaintiff did, to insure them, and afterwards says that he insured in consequence of what the man had threatened, there can be no doubt there was reason, sufficient to satisfy his mind, at all events, to fear incendiarism; and, so far as he was concerned, the answer "No" to the above question was untrue.

It may be said, and well said, that every person who effects an insurance upon his property fears the possibility of its being destroyed maliciously through fire; but in that case there is no reason that could be assigned for the fear, which would be a remote one not suggested by anything personal to him, and not otherwise than as one of the possible contingencies which go to induce him to effect an insurance, and the answer "No" to the question by him would be true.

It is manifest the object of the defendants in putting this question was, to ascertain whether the plaintiff was influenced in his desire to effect the insurance by any fear or apprehension of fire arising from any other than an accidental cause, and the question, as it is framed, should be sufficient to attain this end. It is equivalent to: "*Have you reason to fear, or do you fear, incendiarism?*"

If there is a reason that is sufficient to induce the plaintiff to fear, it surely cannot be doing him an injustice to hold he ought to have told it when asked the question, and the necessity for disclosing it is not removed by the fact that nine men out of ten, or ninety-nine men out of a hundred, would not have thought it a valid reason.

In the case of *Greet v. The Citizens Ins. Co.*, 5 App. 596, it was held that where threats had been made, but by a person who was in the habit of making threats that were considered idle vamping, and did not influence the insured, as he swore, he should have disclosed the threats, overruling the judgment of the learned Chancellor. The learned Chief Justice of Ontario, in delivering the judgment of the Court, said: "He (the Chancellor) thought if the applicant had not reason to believe in the danger, he might, notwithstanding Robb's threats, and notwithstanding the anonymous letter, truly (and therefore properly) answer that he had not reason to believe in the existence of such danger. With great deference, it appears to us that this, if it is to be understood literally, is introducing a dangerous ground of decision. What the plaintiff believed is locked in his own heart, except so far as he may choose to disclose it. What he has reason to believe can scarcely be determined except by considering what a reasonably prudent man, not an extremely timid or suspicious man, but a plain man of ordinary common sense, would consider gave him some reason for believing in the existence of such danger."

The present case is the converse of the case in appeal. The plaintiff feared incendiarism, but did not disclose the fact that he did so fear, and the reason for the fear, which, when reduced into words, does not, further than it shews the plaintiff knew there was a person holding sufficient ill will towards him to threaten him bodily harm, and having ill will might do him mischief in one way as well as another, shew a reason to fear incendiarism; but if the insured, who does not believe there is danger to be apprehended from threats made, is to lose the benefit of his

insurance because he did not disclose that to which he attached no importance, a *fortiori* should his policy be forfeited when he had not disclosed a reason from which he himself feared danger. If he had told his fear, or the reason for it, the company might or might not have made further enquiry, and thereafter taken the risk or not as they thought fit, and they should have had the opportunity for making enquiry given to them.

It has been argued that, at all events, as to the contents of the barn which, at the time of insurance, had no existence, the plaintiff could have had no fear, and when he made his answer that he had none it must have been true, because there could be no fear that things not existing would be destroyed by fire.

The argument might be of weight if the incendiary act to be feared must necessarily happen before the things came into existence.

Take the case where the threat has been, "I'll burn you out," could it for a moment be contended that an insurance effected in consequence of such threat, covering property not then in existence, would not be avoided if the plaintiff had in his application for insurance answered there was no threat of and no reason to fear incendiarism? If the threat had been made years before the application, the answer might be assumed to be correct; but if recently before, it must have the effect of forfeiting the policy as to property not existing, as well as to that which exists; and the argument that such a question and such an answer cannot apply to personal property at all is equally untenable.

Rule absolute.

MOSER V. SNARR.

Promissory note—Defence of forgery—Expert evidence—New trial.

An action against the endorser of promissory notes, who alleged that his endorsement had been forged, was tried twice. On the first trial the jury disagreed, and on the second they found for the plaintiff. No expert evidence was offered at either trial, though the defence intended was fully known. The Court refused a new trial, moved for on affidavits of an expert giving his opinion, founded on a comparison and critical analysis of the defendant's handwriting with the endorsements.

THIS was an action on three promissory notes, made by John Snarr & Sons, payable to the order of the defendant, Thomas Snarr, and by him endorsed to the plaintiffs, Moser, Hoole & Co., of Buffalo.

Pleas: *non fecit*, and forgery.

The defendant was the uncle of William Snarr and George E. Snarr, who carried on business under the name of John Snarr & Sons. They carried on business as coal dealers, in Toronto, until about the time of the maturing of the notes, when W. Snarr absconded, and the firm were placed in insolvency. The notes sued on were given for coal supplied to the defendants.

On the trial, before Cameron, J., on July 4, 1880, the jury disagreed. The second trial was before Armour, J., and a jury, when a verdict was rendered in favour of the plaintiffs for \$6,875.72.

In Trinity Term, 1880, *Ferguson*, Q. C., obtained a rule *nisi* for a new trial, on the grounds that the verdict was contrary to law and evidence, and the weight of evidence; and upon affidavits, from which it appeared that the question of evidence as to the handwriting had been discussed between counsel engaged at both trials, but none had been offered.

During this Term, *Hector Cameron*, Q. C., and *Bigelow*, shewed cause. It was admitted that all three notes were endorsed by the same hand. George E. Snarr swore positively that he obtained one of the endorsements from the

defendant. There was, therefore, sufficient evidence upon which to base the verdict. The defendants had ample opportunity to have produced evidence of experts, if they had desired. The evidence of the expert was only offered as confirmatory of evidence already given, and was not new evidence. The opinions of experts were not sufficient to contradict the positive testimony of one who procured the endorsation, and, besides, the opinion in question is open to criticism.

The affidavit of William S. Snarr, as to the genuineness of two of the three notes, was also filed.

The following cases were cited: *Commercial Bank v. Denison*, 1 U. C. R. 13; *McLaren v. Muirhead*, 3 U. C. R. 59; *Fawcett v. Mothersell*, 14 C. P. 104; *Hooper v. Christoe*, 14 C. P. 117; *McDermott v. Ireson*, 38 U. C. R. 1; *Regina v. McIlroy*, 15 C. P. 116; *Macklem v. Dittrick*, 7 U. C. R. 144; *Lord Abinger v. Ashton*, L. R. 17 Eq. 373; *Seaman v. Nethercliff*, L. R. 1 C. P. D. 540.

Ferguson, Q. C., and *Mulock*, contra. The opinion of the expert is not merely cumulative testimony, but is testimony of an independent character. The credibility of George E. Snarr was attacked by evidence at the trial. The verdict was against the weight of evidence: *Watts v. Hassard*, 7 Met. 478; *Downey v. Patterson*, 3 U. C. R. 573.

December 8, 1880. HAGARTY, C. J.—In this action the defence urged was, that defendant's name was forged on certain notes which the plaintiffs had innocently taken for value in the course of their business. It was brought on for trial before Cameron, J., and the jury were discharged, without agreeing. It was again tried before Armour, J., and the jury, after very full discussion, rendered a verdict for the plaintiffs.

Neither of my learned brothers can find fault with such a finding, after hearing the evidence adduced, and I am obliged to arrive at a like opinion, after a perusal of the evidence. It does not appear that on either of the trials there was any resort to the evidence of experts in handwriting.

It is now sought, for the first time, on defendant's behalf, to resort to that species of testimony; and on a reference to an expert in Boston, of alleged high reputation and experience, an opinion unfavourable to the genuineness of the alleged signatures is produced, verified by affidavit.

We all think it impossible, according to the long established practice of the Courts here and in England, to permit any interference with a verdict fairly obtained on any such ground.

The principle of granting new trials on account of the discovery of fresh evidence, which, with reasonable diligence, was unknown or not capable of being produced at the trial, rests on a distinct and intelligible principle.

The species of evidence here suggested is of a wholly different character. It may be described in this case as corroborative of the defendant's assertion that the signatures were not his. The testimony of the person offered is simply that of his opinion, on a comparison and critical analysis of the defendant's handwriting, alleged to be genuine.

It was fully known from the beginning what the question was for trial, and the line of defence deliberately selected.

Our yielding to the present application would not merely be a departure from a rule established on the wisest principles, but it would establish a precedent of a most dangerous character.

It would be easy to multiply illustrations of its mischievous nature; they must suggest themselves to every lawyer's mind.

See *Commercial Bank v. Denison*, 1 U. C. R. 13; *McLaren v. Muirhead*, 3 U. C. R. 59; *Fawcett v. Motherwell*, 14 C. P. 104; *Hooper v. Christoe*, 14 C. P. 117; *McDermott v. Ireson*, 38 U. C. R. 1.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

BLAND ET AL. V. ANDREWS ET AL.

Prohibition—Division Court Clerk—Garnishing money in hands of.

Semble, that money paid to a Division Court Clerk for a suitor in a cause is paid in to the use of the suitor, and is garnishable.

Per CAMERON, J.—It does not become a debt from the Division Court Clerk to the suitor till demand made, and so is not garnishable until then.

Where the garnishee, who was clerk of the First Division Court of the county of York, had submitted himself to the jurisdiction, and had paid the money in his hands into the Tenth Division Court of the county, from which latter Court the summons issued, and the Judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable,

Held, that the order of GALT, J., discharging a summons for a prohibition was right; and a rule *nisi* to rescind the same, and for a writ of prohibition, was discharged.

Dolphin v. Layton, L. R. 4 C. P. D. 130, remarked upon.

In Easter Term last, *Hector Cameron*, Q. C., obtained a rule *nisi*, calling upon the junior Judge of the county of York, E. H. Duggan, the clerk of the Tenth Division Court in the said county of York, the primary creditor and the garnishee herein, to shew cause why the order of Galt, J., made herein on the 9th day of April, A.D. 1880, discharging a summons granted on the 25th day of March, A.D. 1880, should not be rescinded, with costs, and why a writ of prohibition should not issue to prohibit the said junior Judge from further proceeding in the above cause on the grounds stated in the said summons, and on the grounds that the said summons should have been made absolute, and on the grounds shewn in the affidavits filed on the application for said summons, and re-filed on this motion.

The material facts shewn in the affidavits and papers filed were as follow :

Bland & Co. recovered judgment against Andrews, in the Tenth Division Court of the county of York, for \$52 and costs, on the 11th day of November, A.D. 1879.

On the 22nd day of November, A.D. 1879, there was a suit pending in the First Division Court of the county of

York, by Andrews against Simpson, in which Simpson had paid \$20 into Court, and was disputing the balance, and on that day a summons to the garnishee and primary debtor was issued out of the Tenth Division Court, and served on Mr. Howard, for the 9th day of December, 1879, on which day the suit so commenced by summons to the garnishee and primary debtor, came on for trial, and the trial thereof was adjourned from time to time till the 3rd day of March, 1880, when judgment was given against the garnishee, who thereupon paid the amount in his hands into the Tenth Division Court.

Up to this time no objection was taken to the power or jurisdiction of the Judge to try the said suit.

On the 11th day of March, 1880, Andrews applied, on his own behalf for a new trial, which application was subsequently refused.

On the 25th day of March, 1880, Andrews applied for and obtained a summons from Galt, J., in Chambers, calling upon the said junior Judge, the clerk of the Tenth Division Court of the county of York, the primary creditors, Bland & Co., and the garnishee, McLean, to shew cause why a writ of prohibition should not issue to prohibit the said Judge from further proceeding in the above cause, upon the grounds that the proceedings should have been taken in the jurisdiction in which the garnishee lived: that money paid into Court could not be garnished, and that the account and money paid into Court were assigned before the issuing of the garnishee order.

This summons was afterwards discharged, without costs, by the learned Judge who granted it, and the order discharging it was the order by this application sought to be rescinded.

It was stated in the affidavit upon which the summons was granted, which was sworn on the 22nd of March, 1880, that "the garnishee herein, Mr. Howard, lived at 194 Carleton street, in said city of Toronto, being out of the jurisdiction of the said Tenth Division Court."

November 23, 1880. *Williamson* shewed cause. On the argument before Galt, J., it was contended that he could not review the decision of the learned Judge below, on the two latter grounds, and the objection is renewed before the full Court. The latter point is simply a question of fact, upon which evidence was taken in the Court below, and judgment given by the Judge of that Court. The second point involves a question of law, upon which the learned Judge below has also given his decision; and by section 54 of the Division Courts Act, R. S. O. ch. 47, it is enacted, that "The Judge shall be sole Judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto;" and further, that "every such order, judgment, and decree shall be final and conclusive between the parties." It follows from this, that provided the Judge has jurisdiction in a cause, his proceeding in it will not be restrained, even though he decides against law and good conscience: See *Toft v. Raynor*, 5 C. B. 162, and other cases cited in *O'Brien's* Division Court Act. The case relied on by Mr. *Murdoch* to support the second point in his summons, viz., that moneys in Court cannot be garnished, is an English one, *Dolphin v. Layton*, L. R. 4 C. P. Div. 130; but that cannot be looked upon as an authority in our Courts, because, in the first place, our Division Courts Act is different in many respects from the English County Court Act; and in the next place, the argument in *Dolphin v. Layton* was entirely *ex parte*. If that case should be looked upon as law in this country, the effect of it would be this, that Mr. Dalton, the clerk of the Crown, would occupy the same position, as to moneys in his Court, that Mr. Howard, the clerk of the First Division Court, occupies in regard to moneys in his Court, and this cannot be looked upon as a reasonable state of things for one moment. Mr. Dalton owes no duty to the owners of this money whatever. It is held subject to the order of the Court. Mr. Howard, on the contrary, is bound by the bond which he is obliged to give when assuming office, to pay over moneys on demand. By the

garnishee clauses of the Act, "any debt or money demand due and owing" may be garnished. The question then resolves itself into this, is the money in Mr. Howard's hands a debt? If so, and it is contended that it is, it can certainly be garnished. And to shew that this view is correct, is cited the case of *Murray v. Simpson*, 8 Ir. C. L. R. App. 45, where it was held that moneys in the hands of a sheriff can be garnished. As to the first point, which, it is submitted, is the only one of the three on which Mr. *Murdoch* can hope to succeed, the first objection is, that no objection was taken before the learned Judge below. The case was before him on several occasions, and on none of them was any objection taken by Mr. *Murdoch* to the jurisdiction of the learned Judge to try the case, nor did it ever appear in evidence that the garnishee lived elsewhere than within the limits of the Tenth Division Court, where the proceedings were taken. On this point see *Archibald v. Bushey*, 7 P. R. 304; *Robertson v. Cornwell*, 7 P. R. 297; *In re Burrowes*, 18 C. P. 493.

As to the merits. Section 65 of the Division Courts Act provides that clerks and bailiffs may sue and be sued in the Court of an adjoining division, but shall not bring any suit in their own Court. Section 127, and following sections, provide for garnishee proceedings, and here the word "may" is also used. This word has been held here to mean "shall" or "must," and on the strength of that finding Mr. *Murdoch* contends that these proceedings should have been taken in Mr. Howard's own Court. Such was never the intention of the Legislature; and assuming, as we must for the sake of this argument, that moneys in Court can be garnished, section 65 must regulate garnishee proceedings as well as ordinary suits, where clerks and bailiffs are parties to the suits, as it would be simply absurd to ask a clerk to issue a garnishee summons against himself. He owes a duty first to the suitor, viz., to pay over the moneys in his hands, and if asked to issue a garnishee summons he would be quite justified in refusing to do so, and in at once

remitting the money to the client; and, in fact, if he did not do so, he would render himself liable to an action. Such being the case, the proceedings are properly taken in the clerk's Court.

John A. Paterson, on the same side. The question is, is there a "debt due or owing" (see section 124 Division Courts Act) by the clerk of the Court? The moment money is paid into the clerk's hands for the benefit of the primary debtor, the Division Court Act operates upon it, and creates a debt due to the primary debtor from the clerk. See section 27 of the Act, and form of statutory covenant to be given by the clerk in schedule to the Act, that the clerk "shall pay over to such person or persons entitled to the same, all such moneys as he shall receive by virtue of the said office of clerk." See also rule of Court 97, imposing upon the clerk the obligation to pay over to the owner. The bailiff gives the same form of covenant as the clerk, and in *Lockart v. Gray*, 2 L. J. N. S. 163, it was held that the bailiff was garnishable, and therefore also the clerk. A sheriff can be garnisheed. It is urged that when money is paid into Court, it is theoretically in the hands of the owner, and therefore not garnishable; but the Court should interpret the law so as to aid the honest collection of debts, and not theorize in such an unintelligible manner. In Chancery money in Court is garnishable: See *Wilson v. McCarthy*, 7 P. R. 132. It is there held that the holder of an unsatisfied *fi. fa.* can obtain a stop order on the funds in Court. The practice in Chancery is to serve, without notice thereafter, on the debtor, an order for payment out to the creditor. If the Court of Chancery so aids the creditor, why should not the Division Court, and why should subtle distinctions prevail in Division Courts? As against this an English case is quoted, *Dolphin v. Layton*, L. R. 4 C. P. D. 130, where it is held that the Registrar of a County Court is not garnishable. But it must be observed that on the argument neither garnishee nor primary creditor was represented. The argument was *ex parte*, and Denman, J., gives judgment upon the principle that the Registrar

of the County Court and the Master of the Superior Court are not distinguishable as regards money paid into their respective Courts. The Registrar of the English County Court has the same functions and duties and obligations as the clerk of the Canadian Division Court, and it cannot be a sound judgment that is based upon there being no distinction between the Master of the Queen's Bench and the clerk of the Division Court, as regards money so paid in, for there is a very obvious distinction. The Master cannot pay out to the owner by the same simple process as the clerk does. The Master cannot be individualized as owing anything to the owner of the money, but the clerk can.

Murdoch, contra. The money in the hands of the clerk of the Division Court, in the suit of *Andrews v. Simpson*, having been paid in by defendant Simpson to satisfy the judgment, was not *a debt due and owing* from such clerk to the plaintiff Andrews in such suit, within the meaning of the garnishee provisions of the Division Courts Act, secs. 124, 127, and 130, R. S. O. ch. 47: See *Dolphin v. Layton*, L. R. 4 C. P. D. 130. If money in the hands of a clerk of a Division Court under such circumstances is not subject to garnishment, prohibition will lie: *Holland v. Wallace et al.*, 8 P. R. 186. If such funds are garnishable, proceedings must be taken in the First Division Court of York, where the clerk, Mr. Howard, the garnishee, resided. A garnishee proceeding is not a suit within the meaning of sec. 65 of ch. 47, R. S. O., and cannot be brought in an adjoining division. He also cited *Johnson v. Diamond*, 11 Ex. 73.

December 31, 1880. ARMOUR, J.—On the argument the applicant's counsel stated that he relied upon the first and second grounds mentioned in the summons granted by my brother Galt, and that he abandoned any other grounds.

The first ground, that the proceedings should have been taken in the jurisdiction in which the garnishee lived, fails for want of any proof that the garnishee did not live within the limits of the Tenth Division Court at the time

the summons was issued. It is nowhere stated where he lived on the 22nd of November, 1879, the day on which the summons was issued ; and it does not follow, from the fact that he lived at 194 Carlton street, on the 22nd of March, 1880, that he lived there, or that he did not live within the limits of the Tenth Division Court, on the 22nd of November, 1879.

The second ground, that money paid into Court cannot be garnished, is not, under the circumstances, ground for a prohibition

The learned Judge of the Division Court had jurisdiction to determine whether the garnishee was indebted to the primary debtor, and whether such debt was a debt attachable under the provisions and within the meaning of the Division Courts Act, and it is no ground for a prohibition that he came to a wrong conclusion of law in a matter within his jurisdiction.

Although I think the matter is not before us for adjudication, I am quite of the opinion that money in the hands of a clerk of a Division Court for a suitor is garnishable : See *Tofft v. Rayner*, 5 C. B. 162 ; *Ellis v. Watt*, 8 C. B. 614 ; *Lexden and Munster Union v. Southgate*, 10 Ex. 201 ; *Zohrab v. Smith*, 5 D. & L. 635 ; *Norris v. Carrington*, 16 C. B. N. S. 396 ; *Re Grass v. Allan*, 26 U. C. R. 123.

The rule will therefore be discharged, with costs.

HAGARTY, C. J.—There is great weight in my brother Armour's objection to our right to interfere on the ground of the Judge having jurisdiction to try whether this money, in the hands of the garnishee, be or be not attachable. We have nothing to do with the soundness or unsoundness of his decision.

I feel a difficulty in distinguishing this from an ordinary case where a garnishee disputes any liability, and the Judge decides against him. He then asks for prohibition, on the ground that he neither owes nor ever did owe anything to the judgment or primary debtor.

Here also the garnishee raises no objection, and pays the

money in his hands at once, on the Judge giving his decision, into Court. The objection comes from the debtor, and parties claiming through him.

It would be well to consider the general question.

Apart from any direct authority, I should consider that the money received by a clerk for a suitor in his Court, was money had and received to that suitor's use, and that an action therefor, at all events after demand, would lie as for money had and received. This, I think, has been heretofore generally assumed in this Province, although I cannot refer to any express decision thereon.

It seems assumed in such cases as *Preston v. Wilmot*, 23 U. C. R. 348, and more clearly in *McLeish v. Howard*, 13 App. R. 506.

One of the tests of a garnishable debt is, can it be made the subject of a set-off? I think if a clerk of a Division Court sue a person for a private debt, the latter could set off money coming to him in his creditor's hands.

Rule 95 of Division Courts, which has the form of law, says, that if the clerk receives money for any party by virtue of his office, he shall forthwith notify the party entitled thereto, and that the same is received and subject to his order, and if he fail to notify and pay over the money on demand, he shall forfeit his office. See also rule 97. Section 235 speaks of money paid into Court "*to the use of any suitors thereof.*"

Rule 130 says, that in case of money paid into Court under the 87th or 89th (now 86th and 89th) sections, the same shall not be paid out to the plaintiff until the final determination of the suit, unless the Judge shall otherwise order. This may place money paid into Court, pending a cause, in a different position from money paid in on the final disposition of the suit.

In the case before us, the applicant's attorney swears that "the debt sought to be garnished is a judgment in the First Division Court, in the county of York, recovered by the above named primary debtor against one Simpson, on the 20th of December, 1879."

The garnishment proceedings against *Howard* were commenced by summons issued 22nd November, 1879, after judgment recovered by *Bland* against *Andrews*, 11th November, 1879, and as far as I can judge from the not very satisfactory affidavits filed, there was then some \$20 paid into Court by Simpson: the rest I presume was paid when or after judgment was recovered, viz., 20th December.

After many adjournments and arguments, the order to pay seems to have been made in March, 1880.

Apart from any difficulty as to money paid into Court, while suit pending, I see no reason why a suitor's money in the hands of the clerk who holds it for him, and subject to his order (rule 95), should not be garnishable.

The chief difficulty arises from the apparently adverse decision in *Dolphin v. Layton*, 4 C. P. Div. 130, before Lord Coleridge, and Denman, J. The case is very summarily disposed of. The Court remarks that they could "see no distinction in this respect between the Registrar of a County Court and the Master of one of the Superior Courts." I cannot see any analogy (at least in Ontario) between the position of the Division Court Clerk and the Master of this Court.

Neither by Statute law nor rule is our clerk directed to deal with suitors' moneys, as the clerk in the Division Court. Sheriffs do not pay to him the proceeds of executions, and even the moneys paid into Court with plea, &c., are only paid out by order of this Court. Our statute speaks of money paid into Court "to the use of suitors," and the clerk's statutable covenant is, "that he will duly pay over to such person or persons entitled to the same, all such moneys as shall be received by virtue of his office."

In the present case the garnishee has, under the statute, discharged himself from further liability by paying this money into Court on judgment being given against him. He has no further concern in it. It lies in the Court subject only to this claim, the primary debtor only objecting.

I think we ought to refuse prohibition. There is suffi-

cient difference, in my opinion, between the wording of our statutes and rules and those in England, to prevent us from being necessarily concluded by the apparently off-hand decisions of two Judges, however eminent, supported by a suggested analogy to the case of the Masters of the Superior Courts, which, at least in Ontario, I may say, with deference, can hardly be said to exist.

It is to be observed that the decision there was on appeal in a case stated, not in prohibition.

If a case come duly before us on behalf of a clerk of a Division Court raising, as a matter of general importance, the question whether moneys of suitors in his hands are garnishable, especially if the Judge refuse to garnish, we may have to consider whether *mandamus* will lie to order him to do so.

As at present advised, I do not think prohibition will lie in the case before us.

CAMERON, J.—I concur in the conclusion arrived at by my learned brothers, that a writ of prohibition ought not to go in this case, on the ground that Mr. Howard, the garnishee, by paying the money into the Western or Tenth Division Court, so paid it for the use of the plaintiff, and submitted himself to the jurisdiction of that Court, if otherwise he was not subject to it. But I am of opinion, under the authority of the case cited in the argument of *Dolphin v. Layton*, L. R. 4 C. P. D. 130, which is not distinguishable in principle from the present case, that money in the hands of a Division Court clerk, received by him by virtue of his office, is not garnishable, at all events until a demand has been made upon him by the plaintiff in the suit of payment after it has been received.

The clerk of the Court, as I understand his position and duties, is the custodian of all moneys paid into Court, but he is not *eo instanti* that he receives them debtor of any one in respect thereof. He holds them undoubtedly to be paid to the person entitled thereto, but he has not made himself liable to be sued therefor until he has made him-

self the personal debtor of the person so entitled by neglecting to pay the money on demand. To hold that the money can be garnished in his hands before a demand by the creditor, is to hold that he may be sued and put to costs without a demand, which would be subjecting him to an unreasonable hardship ; and as there is a clear English authority, which ought to be binding upon the Court, I see no reason in the public interest that requires us to hold money in a Division Court clerk's hands before demand garnishable.

As, however, under some circumstances the money in his hands may be garnishable, that is, after failure to pay on demand, it cannot be said the Division Court has no jurisdiction to try the matter at all. The Judge has the right to try, and should determine in each case whether the facts exist or not that make the money garnishable ; and if he does so decide upon evidence, this Court has no right to review his decision on the merits.

Rule discharged, with costs.

HARPER V. DAVIES.

Master and servant—Agreement not to be performed in a year—New trial.

In action on a verbal agreement made in November, for the hiring of plaintiff by defendant for a year from the 1st of December then next: *Held*, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied.

There were also common counts, on which there was evidence for the jury, but as the verdict certainly included some damages upon the special counts, a new trial was granted on the common counts, and a nonsuit as to the others.

DECLARATION: First count, alleging wrongful dismissal by the defendant of the plaintiff, hired by him for one year, as a commercial traveller, at \$1,200 a year, payable annually.

Second and subsequent counts: The common counts for work and labour, money lent, money had and received, interest, and account stated; with a count added at the trial for wrongful dismissal, alleging a monthly hiring.

Pleas to first count. 1, did not promise; 2, did not dismiss; and, 3, misconduct justifying dismissal.

To the subsequent counts, never indebted, and payment. Issue.

The particulars delivered under the common counts, were as follows:

To balance due for wages to Feb. 1st, 1880....	\$ 25 00
“ Three months’ wages to May 1st, 1880...	300 00
“ Overcharge of Tea.....	3 00
“ Freight deducted.....	17 00
	<hr/>
	\$345 00

The cause was tried before Morrison, J. A., and a jury, at the last Fall Assizes at Toronto, when a verdict was rendered for the plaintiff, and \$150 damages.

It appeared that at the time of the dismissal the defendant’s book-keeper, at the request of the defendant, made up the plaintiff’s account as follows:

1879.	<i>Cr.</i>	
Dec. 4.	By two Sample cases.....	\$13 00
" 27.	" Expenses	61 00

1880.

Jan. 23.	By Expenses	39 65
" " "	Two months' salary to 31st inst., \$75	150 00
		<hr/>
		\$264 30

1879.	<i>Dr.</i>	
Dec. 3.	To Cash.....	\$25 00
" 4.	" Mrs Robinson	51 40
" 12.	" 60 lbs. Tea, 50c.	30 00
" 27.	" Cash.....	21 00

1880.

Jan. 6.	" "	20 00
" 23.	" Freight.....	17 00
		<hr/>
		\$164 40

Balance due you \$99 90

This balance, according to the defendant's evidence, was paid to the plaintiff in full settlement. This the plaintiff denied, and said that it was received by him under protest. He, however, wrote across the face of the account, "Paid M. A. Harper, January 23rd, 1880."

According to the plaintiff's evidence, the agreement for the hiring was made and concluded in November, and was to be for one year from the 1st day of December then next.

At the close of the plaintiff's case a nonsuit was moved for, at least upon the first count, on the ground that the agreement was for a hiring not to be performed within a year, and was not in writing.

This was refused.

A nonsuit was also moved for on the subsequent counts, but for what reason was not stated.

This, too, was refused.

No objection was raised to the Judge's charge, but at the close of the whole case a nonsuit was again moved for and refused.

After the jury brought in their verdict, the defendant's counsel requested the learned Judge to ascertain from the jury how they arrived at their verdict, when the foreman said, "We came to the conclusion to give him a lump sum."

In Michaelmas Term, November 17, 1880, *A. Cassels* obtained a rule *nisi* for a new trial on the law and evidence, or for a nonsuit, on the grounds taken at the trial.

December 6, 1880. *McGregor* shewed cause. The defendant must fail, as no objection was taken at the trial to the Judge's charge. The learned Judge left the whole matter to the jury, and told them that they might on the defendant's own statement find that there was a monthly hiring, as the defendant had said "he would give the plaintiff \$75 a month." The jury gave a verdict for \$150. It was evidently intended by them to give one month's wages, \$100, under the added count for a monthly hiring, and \$50 under the common counts. The evidence of the plaintiff shewed an agreement for a yearly hiring, but there was a part performance and a subsequent ratification of the agreement by the parties within the year, as services had been rendered and wages paid under the agreement. If there was a misunderstanding between the parties, as one swore to one state of facts and the other to another, the law will imply a monthly hiring as between master and servant: *Hartley v. Harman*, 11 A. & E. 798. The terms of hiring was a question entirely for the jury, and they found for the plaintiff, and the finding should not now be disturbed: *Baxter v. Nurse*, 6 M. & Gr. 935.

A. Cassels, contra. It was unnecessary to object to the Judge's charge, as at the close of the plaintiff's case the objection was taken that the agreement of hiring being one made in November, to take effect on December 1st, for a year from that date, no action could be maintained in respect of any determination of the employment thereunder. The learned Judge should have directed a nonsuit on the first two counts. The plaintiff, by his own evidence, shewed the agreement to have been as above stated, and the case

should not have been allowed to go to the jury on the question of damages for wrongful dismissal. The only sum in dispute, irrespective of that under said agreement, was one of \$30, and the verdict given by the jury contains damages for breach of said agreement. He cited the following cases: *Brittain v. Rossiter*, W. N. 1879, p. 48; *Dixon v. Jacques*, 31 U. C. R. 141; *Davis v. Appleton*, 25 C. P. 376; *Nichols v. Nordheimer*, 22 C. P. 48; *Wright v. Skinner*, 17 C. P. 317; *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R. 517; *McCreary v. Grundy*, 39 U. C. R. 316.

December 31, 1880. ARMOUR, J.—The agreement for hiring set up by the plaintiff not being in writing, and being an agreement not to be performed within the space of one year from the making thereof, it is clear upon the authorities that no action can be maintained upon it by the plaintiff for his wrongful dismissal.

The authorities also shew that, there being an express agreement in fact, although one that no action can be maintained upon, no agreement can be implied: See *Brittain v. Rossiter*, 40 L. T. N. S. 240; *S. C.*, 48 L. J. Exch. 362.

The learned Judge ought therefore to have nonsuited the plaintiff upon the counts for the wrongful dismissal.

I do not see, however, how he could have withdrawn the plaintiff's claim upon the common counts from the jury; and as they gave a lump sum, which certainly included some damages upon the counts for the wrongful dismissal, there must be a new trial as to those counts.

The rule will therefore be absolute to enter a nonsuit on the special counts, and for a new trial as to the common counts, with costs to abide the event.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule accordingly.

WHITELAW V. TAYLOR.

Guarantee—Sufficiency of.

The plaintiff agreed with M. to repair a boiler in the latter's saw mill. During the progress of the work he received the following letter from the defendant: "As Mr. Morden's saw mill at Bismarek is about to come into my hands right away, and as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible: everything at present is at a standstill, waiting on you. Please push on the work and oblige yours truly, R. TAYLOR." The plaintiff, without communicating with the defendant, went on with the work. The defendant's contemplated purchase was not carried out: *Held*, that the defendant had not rendered himself liable by the above letter for the price of the work done, and that a nonsuit had been properly entered.

THE first count of the declaration alleged that the plaintiff had agreed with one Morden to repair a boiler, &c., for a certain price, to be paid by Morden therefor, and Morden promised to pay, &c., and the plaintiff had proceeded with the work, and in consideration that the plaintiff would discharge Morden from his promise, and would finish the work at the instance of and for the defendant, the latter promised to pay the plaintiff therefor: that the plaintiff did discharge Morden, and did finish the work.

Breach: non-payment by the defendant.

The second count was the common count for work done, &c.

Pleas: traverse of all allegations in the first count, especially the discharge of Morden; and never indebted.

The trial took place before Cameron, J., at the last Fall Assizes, at Woodstock, when a nonsuit was entered.

The plaintiff was a machinist. Morden had a steam saw mill, the boiler of which required repairs, and early in 1879 they met in the train, and Morden consulted him about doing the repairs. The plaintiff made an approximate calculation of cost at about \$300. Morden spoke of getting materials in Buffalo, and whatever materials he furnished were to reduce the plaintiff's claim for costs. The plaintiff ordered some materials at Montreal for the

work, which were sent straight to Bismarck station, near the mill. This, he said, was after he had received a letter from Morden, dated March 5th, 1879, speaking of the material, and asking the plaintiff if he would furnish all and do the work, and offering security, and asking for a prompt reply.

The plaintiff did not seem to have sent a written reply, but he ordered the tubing from Montreal direct.

On the 27th of March he charged Morden for the boiler head, \$19.50 ; on the 3rd of April, for tubes, \$151.20 ; and on the 12th of April, for work, \$31.87. This was for work done in the shop.

After he received defendant's letter he wrote in a book, "per Taylor's order."

It appeared that the defendant was negotiating with Morden for the purchase of the mill, and he wrote to plaintiff this letter :

" GUELPH, April 28, 1879.

" DEAR SIR,—As Mr. Morden's saw mill at Bismarck is about to come into my hands right away, and as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible. Every thing is at present at a standstill, waiting on you. Please push on the work, and oblige,

" Yours truly,

" R. TAYLOR.

" R. WHITELAW, Esq., Woodstock."

The plaintiff did not reply to this, and had no communication with the defendant on the subject. He said he would not have sent up his workmen or completed the work on Morden's responsibility, or without security, but being satisfied with what he heard of defendant, he proceeded and sent up three men about the 1st of May, and that he did the work on the defendant's credit.

The tubing from Montreal was lying at Bismarck station, subject to charges. They asked Morden to pay, but he refused. The defendant came with Morden, and after some discussion he took out his pocket-book, paid \$21.20 freight, and went away on the train. A horse of Morden's drew

the tubes down to the mill, and the men did the work by the 16th of May.

The plaintiff said that generally the man for whom the work was done paid the freight and boarded the men.

In the plaintiff's evidence a letter from Morden to him, dated 14th of April, was proposed to be read, but was objected to, and rejected as being before the defendant intervened. At the end of the evidence he was recalled, and said, in answer to a question whether he had instructed Morden that he would not do the work without security, "Well, I did not; but in answer to that I may state that I had a letter from Morden, telling me to stop the work, and not go on with it without further instructions, and these further instructions I received from Taylor."

This would appear to have been the letter previously rejected, and no further question was raised about it, and it did not appear to have been in any way relied on either at the trial or on the argument. The letter was not before the Court.

On the 30th of May the plaintiff wrote to defendant:—

"WOODSTOCK, ONT., 30th May, 1879.

"DEAR SIR,—We have now got the boiler finished that you gave the order to get done for you as quick as possible. Amount is over \$330. I will send you bill in a day or two. In the meantime, please remit at least a part of the amount, and will credit you with amount on account. By doing so, you will oblige

"R. WHITELAW."

Plaintiff replied June 6th.

"BUFFALO, 6th June, 1879.

"DEAR SIR.—I am in receipt of yours of the 30th of May, forwarded from Guelph to-day.

"Referring to the boiler at Morden's mill, you must look to him for payment. As I wrote you, negotiations were in progress at the time by which I was to purchase the mill, but Mr. Morden has not been able to, or at least not carried out the agreement. If I had become possessor of the mill, or if the agreement for the purchase had been completed, I

would have assumed to pay you \$300, the amount represented by Mr. Morden, on the terms arranged between you and him.

“R. TAYLOR.”

On the 23rd of July, the plaintiff wrote to Morden.

“WOODSTOCK, 23rd July, 1879.

“DEAR SIR,—I have expected to hear from you or Mr. Taylor, informing me what arrangements you have made with Mr. Taylor about paying the repair on the boiler. If the matter is not settled in some satisfactory way before the 1st of the month, I will be obliged to take proceedings against Mr. Taylor to recover the amount due me on these repairs. An answer from you will be received with thanks; also, anything you may pay me will be credited on account.

“R. WHITELOW.”

Again he wrote to Morden on the 10th of July, in answer to a post card from him, apparently complaining of the boiler leaking, and plaintiff discussed the cause, saying :

“If the cause is through defective workmanship, I will make it good, but must be settled for the job before going to any more expense in the matter. I have not taken proceedings against Mr. Taylor yet, hoping you would be good enough to settle satisfactory, as I wrote you; and as to the bill being more than was talked about, there was more work done, and if you intend to ship the other rims ordered, I would be obliged if you would do so; if not I will be obliged to get them elsewhere, &c.

“P.S.—I expected you would at least pay the board bill, but the man writes me you have not done so yet. I understood you to say you would settle it when I saw you last. There was also a small amount due to some man there that my man had promised to pay, which I expected you would settle for, but I presume have not done so. I am perfectly willing that you should pay these two small sums, and charge me in account with. Some of the last rims sent me we cannot use, as they are broke at some large knots in the stuff.”

Plaintiff took back some articles, and said: “On the 7th June, I gave credit to Morden for \$81.87.” This was the day after the date of defendant’s letter repudiating the liability of June 6th.

Morden was not called as a witness.

It did not appear that defendant was ever in possession, or exercised any control over the mill, and the contemplated sale to defendant was never completed.

On objection taken, the learned Judge directed a nonsuit, holding that the letter of the 28th of April was not a contract with plaintiff to pay him for the work, and amounted to no more, as far as plaintiff was concerned, than a reason for the interference of the defendant in the matter, and that Morden continued liable for the work, and the writing could not be read as a guarantee by defendant to plaintiff for it.

Leave was reserved to enter a verdict for plaintiff for \$270.58.

November 18, 1880. *Falconbridge* obtained a rule *nisi*, on the leave reserved, to set aside the nonsuit.

December 1, 1880. *Rose* shewed cause. On the evidence taken with the letter it is clear that Morden continued liable, and the right therefore against defendant, if any, was as the guarantor. The letter is not evidence of a guarantee within the meaning of the statute, and contains no promise to pay, amounting merely to a notice to the plaintiff that the defendant had agreed with Morden to assume the repairs when the mill would come into his hands; and also assuming the pre-existence of a contract between the plaintiff and Morden. He cited *Bond v. Treahey*, 37 U. C. R. 364; *Scotson v. Pegg*, 6 H. & N. 295; *Birkmyr v. Darnell*, 1 Sm. L. C. 8th ed. 326; *Merner v. Klein*, 17 C. P. 293.

Bethune, Q. C., contra. There was no binding contract between the plaintiff and Morden, as it was a contract for the sale of goods for over £10. The letter referred to was a positive promise to pay the plaintiff, and was not conditional; and, lastly, the work was done on the credit of defendant. He referred to *Lakeman v. Mountstephen*, 7 E. & I. App. 20.

December 31, 1880. HAGARTY, C. J.—It appears to me clear that Morden was never discharged from liability to plaintiff, and continues so liable. The dealings between him and the plaintiff from beginning to end shew this. The letter of defendant contains no promise to pay, or direct pledging of his credit beyond the assertion that if he became the purchaser he was to assume the expense of repairing the boiler. He requests plaintiff to push on "the work to be done by you on the boiler," not for himself ordering any work, or agreeing for any repairs, but merely requesting that the work already contracted for with Morden be promptly proceeded with. The letter is in effect: "I am in treaty to purchase. If I do so, I am to pay what Morden has undertaken to pay you. Pray proceed as fast as possible on your part of the bargain."

I think when the proposed purchase fell through, the whole foundation and consideration of this letter fell with it.

Plaintiff never communicates with defendant, never sees him, but goes on with the work and completes it, very probably well pleased to hear that a solvent purchaser would have the property, and would pay him. Even if he trusted wholly to this, and would not otherwise have completed the work, I do not see how he would be in a better position, as defendant never became in the position in which alone he would be liable.

I see no subsequent action of defendant to create a liability. His casual advance of the freight on the tubes can avail nothing. He and Morden were both there at the time, and no explanation is given of any grounds on which the loan or advance was made. It was certainly not on that that plaintiff could have relied to shew liability, as his men were sent up previously to do the work.

The view I take of the evidence renders it unnecessary to discuss the general law at any length.

As I think Morden was originally and always liable, then if we considered this to be a collateral promise, it would have to be in writing to satisfy the Statute of Frauds.

As was said by Richards, C. J., in *Merner v. Klein*, 17 C. P. 292: "The question whether each particular case comes within this clause of the statute (the fourth) or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

In *Bond v. Treahey*, 37 U. C. R. 365, the same doctrine is affirmed by this Court, and it is added: "There can be no doubt that the performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person, if the latter derives benefit from the performance," citing *Scotson v. Pegg*, 6 H. & N. 295.

The general principles are fully discussed in *Mountstephen v. Lakeman*, L. R. 7 H. L. 17, in appeal from L. R. 5 Q. B. 613, *S. C.*, 7 Q. B. 196.

If there were here any direct pledging of personal credit absolutely, the case might have gone to the jury thereon; but neither in the writing or otherwise can I see anything amounting thereto.

I therefore think the nonsuit was right.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

BERNARD V. COUTELLIER.

Malicious prosecution—Rejection of evidence—New trial—C. L. P. Act, sec. 289.

In an action for malicious prosecution, on the opening of the defence the defendant was called and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on preceding to state what he had heard, the learned Judge ruled that this was inadmissible, and that the persons who had told him these facts should first be called. They were then called and examined, and afterwards the defendant gave his evidence as to what they had told him. The jury found a verdict for plaintiff with \$500 damages.

Held, that the evidence was improperly rejected when offered; but, ARMOUR, J., dissenting, that as it had afterwards been received, no substantial wrong or miscarriage having been occasioned by the ruling, and that the verdict being satisfactory, a new trial should be refused under sec. 289 of the C. L. P. Act.

This was an action for malicious prosecution tried at the last Fall Assizes at Toronto, before Morrison, J. A., and a jury, when a verdict was rendered for the plaintiff for \$500.

The plaintiff had for some four or five years been in the employ of the defendant, a dealer in ostrich and fancy feathers, carrying on business in Toronto and Detroit. The practical part of the Toronto business was managed by the plaintiff. There appeared to have been some ill feeling existing between the plaintiff and some members of the defendant's family, in consequence of which the plaintiff left defendant, and went into the employment of a person in a similar business.

Shortly after he left, defendant called at his boarding house and left word that he had issued warrants for his arrest, and intimating that he had better leave the city. Plaintiff not doing so, he was shortly afterwards arrested on two charges, one accusing him of having embezzled two dollars, and the other, of having stolen an ostrich feather.

It appeared from the evidence that the ostrich feather had been given by the plaintiff in part payment of certain work that was done for defendant. The two dollars was connected with the same transaction, and alleged by the plaintiff to have been properly paid out.

At the trial the defendant's counsel proposed, in the cross-examination of plaintiff, to shew that in the year previous there had been trouble with the plaintiff regarding certain moneys. An objection was raised to the admission of this evidence. The learned Judge, although inclined to think the evidence inadmissible, told the defendant's counsel that if he pressed it he would admit it. The matter then apparently dropped.

Upon the defendant being called, he proposed to give in evidence certain statements made to him by members of his family as to the alleged offences. The learned Judge thought, that before such statements were given in evidence the parties making them should be called to shew that some offence had been committed, or the grounds for supposing that such was the case.

The following is an extract from the notes of the short hand writer at the trial :—

“Q. When did you first hear about the feather? A. I received a letter from my wife in June.

Q. Did you come back to Toronto in consequence of that letter? A. I could not come exactly the day I received the letter; but I said I was coming after the 4th of July. I came on receiving a letter about Bernard.

Q. What did you learn—that is, about this particular feather and money business? A. I learned by my folks.

Counsel for Defendants.—I object to this style of giving evidence; I do not think the evidence is admissible.

HIS LORDSHIP.—You must have the facts first; he was told this by another person.

Plaintiff's Counsel.—I submit I am entitled to give evidence what answer was given him by other parties.

HIS LORDSHIP.—Certainly not; you must call these parties; it seems to me it would be wrong to admit anything of the kind. * * These other parties can be called if there are facts within their knowledge. He has to see that something was stolen from him first.”

The defendant then left the box, and the parties were called, the defendant subsequently being examined as to any such statement so made to him.

November 19, 1880. *Bigelow* obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground of refusal to admit evidence as to prior trouble between the parties, and on the ground that the Judge had refused to allow the defendant to give in evidence statements made to him.

December 8, 1880. *Reeve* shewed cause, and contended that defendant had been permitted to give in evidence all statements made to or conversations had with him, upon which he in any way relied in making the charges against the plaintiff: that it was only the mode of procedure proposed by defendant's counsel in giving such evidence that was altered, and that no substantial wrong had been done.

And as to the question of rejection of evidence, that defendant's counsel had not pressed the same, and that had he done so, it would have been admitted.

Bigelow, shewed cause. The information upon which the defendant acted is admissible without calling the informant. The learned Judge erred in ruling that a crime must first be proved, and the informant called to prove the truth of the statements. It is of no consequence whether the information be true or false so long as the defendant acted *bonâ fide* on it. This ruling is on a vital point and entirely changed the course of the defence to the prejudice of the defendant, and a new trial should be granted as of right. The cross-examination of the plaintiff as to an alleged series of embezzlements should not have been stopped. The reporter's notes upon this point are not only inaccurate but entirely omit the specific ruling when the point was taken. The notes are so meagre as to be misleading.

December 31, 1880. HAGARTY, C. J.—The evidence fully supports the verdict; and unless there was some legal miscarriage, we could not think of interfering. It appears that on the opening of the defence defendant was called. He stated that on his return to Toronto, at the request of his family, in a matter respecting the plaintiff, who had been

in his employ, he learned from his folks some matters about the plaintiff, on which he made the arrest complained of.

On proceeding to state what he thus heard, it was objected to as inadmissible, and the learned Judge is reported to have held that he must call the parties who told him.

If the case stopped here, we should be compelled to allow a new trial, as we cannot agree with this ruling, for we consider any person charged with a malicious prosecution may state the information given to him by any persons on which he acted.

It is of course matter of comment if he fail to call such persons to prove such information, if they can attend. Many cases may occur in which a defendant has honestly acted on information from persons whose attendance he cannot procure, or whose identity he cannot ascertain.

The persons from whom he received information were his sister-in-law and her mother, and one Hitchenson, who had been examined as a witness for plaintiff. The mother-in-law and daughter were then called and examined, and cross-examined as to the facts and what they told defendant, and how they discussed the matter with him. He was then recalled and proceeded to state what they told him. He then states that he went to Hitchenson to get more information, and he details all that the latter told him. He was examined and cross-examined at length on all these points.

However we differ from the ruling, it is impossible not to see that, in effect, it could not in any way have affected the defence. The only result was, that all that was told defendant was first proved directly by the parties who told him, and he then told his whole story as to such information at full length.

No suggestion whatever was made as to anything which he could say had been told to him, which did not appear in evidence, or which he was in any way prevented from telling in consequence of the ruling.

Mr. Bigelow urged that in deference to the ruling he abstained from asking his client what he was told ; but a careful examination of the evidence seems to us effectually to disprove the possibility of anything having been thus withheld.

The defendant in no way suggested that anything had been told to him by either of the women which they did not state in their evidence. As to Hitchenson, he was allowed to state every thing on which he relied that Hitchenson had told him.

Mr. Bigelow also urged that he was prevented from asking the plaintiff, on cross-examination, as to some pecuniary difficulty between him and the defendant in the previous year, wholly unconnected with this prosecution, as to some false representation said to have been made by plaintiff to defendant as to a bank balance.

This was objected to as irrelevant. The learned Judge said : " Do you think that evidence will do your case any good ? " Mr. Bigelow : " I do not think so. " It does not seem then to have been further pressed.

The charge to the jury was not objected to.

We then find in the notes, Mr. Bigelow said : " I proposed to give evidence of the defalcation in the bank account, and other transactions of the same kind, shewing that when we did come to this we had reasonable and probable cause. "

The learned Judge : " Had it anything to do with the case, even if it was so ? I remember quite well it had nothing to do with the case : that I told you if you persisted, I would allow it, but it would be against you : that the evidence would not be in your favour. "

This of course disposes of any objection that such evidence was really rejected.

As to the alleged misdirection, we may be well satisfied that it had no effect whatever on the defence, and that its only result was, that the two women gave their evidence of what they told defendant, and what had happened, before he gave his account of the information on which he acted.

It seems to be emphatically a case within the words of

section 289 of the Common Law Procedure Act, R. S. O. ch. 50 : "A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court * * * some substantial wrong or miscarriage has been thereby occasioned in the trial of the action," &c.

It is impossible to imagine that a new trial could be of any advantage to the defendant even if we felt bound to allow it to him.

ARMOUR, J.—I do not think that the defendant had his case fairly tried. He was compelled to take a course in conducting his defence which he would not have taken but for the erroneous ruling of the learned Judge, and was handicapped by that ruling throughout. Having, however, the option of conducting his defence according to the erroneous views of the learned Judge, or of refusing so to conduct it, he yielded to those views. If he had refused to yield, we must have granted him a new trial; having yielded, it is doubtful if he is entitled to one, except in our discretion. The effect of the erroneous ruling was, as I read the report of the trial, to compel him to call other witnesses before he himself gave evidence—not to altogether exclude the evidence he was about to give, but to prevent his giving it until after the other witnesses had given their evidence; in other words, to compel him to adopt a certain mode of procedure which he was not bound in law to adopt. This must have had a very prejudicial effect against the defendant, and an effect which I think we ought to relieve the defendant from by granting a new trial. I decline to guess what the verdict would have been if the defendant had been allowed to conduct his defence in the manner he was by law entitled to conduct it; still more to bind myself to the guess that it would have been just the same.

CAMERON, J.—By section 289 of the Common Law Procedure Act, it is declared "A new trial shall not be granted on the ground of misdirection, or of the improper admission

or rejection of evidence, unless in the opinion of the Court to which application is made * * some substantial wrong or miscarriage has thereby been occasioned in the trial of the action." * * *

In this case it is not possible for the Court to say that any substantial wrong or miscarriage has been occasioned in the trial of the action by the order in which the evidence was given.

The defendant had the benefit of the information that was given to him that led to the prosecution of the plaintiff, and it could not affect the case that he was not allowed to state that information before his witnesses were examined, when he was permitted to do so afterwards.

As a matter of law, I think a person sued for malicious prosecution may state the information he received, and on which he acted, without calling his informant. The value of his testimony, unsupported by that of his informant, would depend altogether upon the surrounding circumstances, of which the jury must judge in each case. Parties being admissible witnesses on their own behalf, there can be no difference in principle between the admissibility of the evidence of the defendant that A. B. told him so and and so, on which he acted, and that of A. B. that he did so tell him.

The question at issue is, not whether the person accused was guilty of the offence, but whether the defendant had reasonable and probable cause to believe he was, and acted in good faith upon such belief. If therefore the defendant had not called his witnesses, and given his own account of what they told him after they had been so called, the rejection of his evidence would clearly have entitled him to a new trial; but I cannot see how he has been substantially wronged by the course he was forced to adopt at the trial; and if not substantially wronged, under the above section of the Common Law Procedure Act, the verdict being satisfactory, I do not see how the Court can interfere.

Rule discharged.

IN RE HIGH SCHOOL BOARD OF HIGH SCHOOL DISTRICT
NUMBER FOUR OF THE UNITED COUNTIES OF STORMONT,
DUNDAS, AND GLENGARRY, AND THE MUNICIPAL
CORPORATION OF THE TOWNSHIP OF WINCHESTER, IN
THE COUNTY OF DUNDAS; AND IN THE MATTER OF
THE SAID HIGH SCHOOL BOARD AND THE MUNICIPAL
CORPORATION OF THE TOWNSHIP OF WILLIAMSBURG,
IN THE COUNTY OF DUNDAS.

*High school districts—Separation of part—Liability to contribute—Money
demanded before separation—Amendment.*

High School District No. 4 of the United Counties of Stormont, Dundas, and Glengarry, was, by by-law 551 of those counties, composed of the village of Morrisburg and the townships of Winchester and Williamsburg, in the county of Dundas. On the 29th April, 1878, the accommodation being insufficient, the Board of Education in Morrisburg resolved to levy \$7,000 on the district, in order to erect a school house, and on the 19th July, 1878, the chairman, having been authorized by a resolution of the board, made a demand in writing, under his hand and the seal of the board, upon the townships to raise their proportions. On the 22nd June, 1878, the United Counties, by by-law 590, repealed that portion of by-law 551 relating to the county of Dundas, and enacted that District No. 4 should consist of Morrisburg only. In February, 1879, this by-law was quashed, but the rule was re-opened, and in February, 1880, it was finally quashed, except in so far as it repealed by-law 551. In June, 1879, the county council, by by-law, discontinued the existing High School Districts in the county of Dundas.

Held, HAGARTY, C. J., dissenting, reversing the decision of Galt, J., that the municipalities of the townships of Winchester and Williamsburg were still liable to contribute their proportions of the sum demanded: that the legal rights of the board at the time of the demand must govern: that the by-law having been quashed was as if it had never existed; and that a mandamus should go.

Per HAGARTY, C. J.—Before the demand, the county council had, by by-law 590, professed to abolish the district; until it was quashed the municipalities were justified in refusing to comply with the demand; and even if the unquashed clause did not put an end to the district, no school house having been built, and the townships having been since legally withdrawn, the demand should not now be enforced.

There having been a misnomer in the names of the applicants, *per* ARMOUR and CAMERON, JJ., such misnomer not having been objected to on the argument below might be amended. *Per* HAGARTY, C. J., in such a case no amendment should be granted as a matter of discretion.

On the 6th of May, 1879, rules *nisi*, entitled as above were obtained by *W. S. Smith*, in each of these cases, on behalf of the said High School Boards, in the first calling

on the municipal corporation of the township of Winchester to shew cause why a *mandamus* should not issue, commanding them to raise and pay \$2,676.75, being the proportion required to be raised and paid for the purpose of erecting a high school building, and for providing high school accommodation for High School District No. 4, as required by the demand of the said board; and also to raise and pay to the board \$152.94, being the proportion required for the maintenance of the said high school, pursuant to a demand of the said board.

The rule in the Williamsburg case was for \$3,431.59, for the same purpose.

These rules, after much delay, were, after argument, discharged by Galt, J., on the 16th of April, 1880, when this appeal was brought.

It appeared that after many changes, the United Counties' Council established High School District No. 4 as consisting of the townships of Winchester and Williamsburg, and the incorporated village of Morrisburg, in the county of Dundas: that the accommodation being insufficient, the Board of Education in Morrisburg, on the 11th of March, 1878, passed resolutions to procure a site and erect a high school building: that on the 29th of April, 1878, it was resolved to levy on High School District No. 4, \$7,000, for high school purposes: that on the 27th of May, 1878, it was resolved to make requisitions on the several municipalities of the district to raise their ratable proportions: that on the 12th of August, 1878, the secretary was directed to advertise for plans and specifications for the high school building: that on the 14th of February, 1879, tenders were directed to be advertised for: that the board purchased and paid for a site \$1,200: that on the 19th of July, 1878, a demand, addressed to "The Corporation of the Township of Winchester," and signed "A. G. Macdonell, Chairman Board of Education of Village of Morrisburg," stating that he had been instructed by the board to make the demand, was made on that township: that a similar demand was made on the township of

Williamsburg on the 19th July: that another demand for the share of a sum of \$400 for maintenance was made on the reeve of Winchester on the 19th of July, 1878: that the Board of Education for the village of Morrisburg was a union board, composed of the High School Board of High School District No. 4 and the Public School Board of the village of Morrisburg: that on the 12th of October, 1877, a by-law of the counties was passed, No. 551, arranging the districts and making No. 4 as above: that on June 19th, 1878, a majority of the reeves and deputy reeves of the county of Dundas requested the united counties of Stormont, Dundas, and Glengarry to alter the boundaries of No. 4; and at a council meeting, held at or about the same time, by-law No. 590, hereinafter mentioned, was discussed, and notice given by Mr. Chamberlain, a resident of Morrisburg and member of the County Council, that if it were passed application would be made to quash it: that on the 22nd of June, 1878, by-law 590 was passed by the united counties, in compliance with this request, entitled "A By-law to amend that portion of By-law No. 551, which relates to High School Districts, for High School purposes in the county of Dundas," and enacting that that portion of 551 relating to the county of Dundas be repealed, and that district No. 4 in the county of Dundas should embrace and be composed of the village of Morrisburg only, and repealing all other inconsistent by-laws.

In consequence of this alteration, the corporations of Winchester and Williamsburg refused to pay their respective portions of the \$7,000.

On the 8th of November, 1878, a rule *nisi* was obtained by *J. E. Rose*, to quash this by-law 590, on the ground, among others, that it was *ultra vires*.

This rule was made absolute on the 5th of February, 1879, no cause having been shewn against it.

In Easter Term, application was made to have this cause re-heard, under very special circumstances as to the serving of the rule and the knowledge of the County Council, and the Court allowed it to be re-heard.

The case was heard on December the 6th, 1879, and on the 2nd of February, 1880, the Court gave judgment quashing By-law 590, with costs, in so far as it changed the limits of the High School Districts, but that part of it repealing by-law 551 was left in force (a).

On the 27th of June, 1879, the County Council passed by-law 617, enacting that the existing High School districts in the county of Dundas were thereby discontinued and abolished.

On November 24, 1880, *McCarthy*, Q. C., appeared for the appeal, and *Bethune*, Q. C., contra.

The arguments appear in the judgments.

The following cases were referred to: *Free v. McHugh*, 24 C. P. 13; *Hutchinson and Board of School Trustees of St. Catharines*, 31 U. C. R. 274; *Brookes and Corporation of County of Haldimand*, 41 U. C. R. 381, 3 App. R. 73; *Peterkin v. McFarlane*, 4 App. R. 25, 34; *Scott v. School Trustees of Burgess and Bathurst*, 21 C. P. 398; *Port Rowan High School and Corporation of Walsingham*, 23 C. P. 11; *Re Board of Education of Town of Perth and Corporation of Town of Perth*, 39 U. C. R. 34; *Re Niagara High School Board and Corporation of Township of Niagara*, 1 App. R. 288; *Board of School Trustees of Brockville v. Town Council of Brockville*, 9 U. C. R. 302.

It was objected for the municipal corporations that the demand was insufficient, being in the name of the chairman of the Board of Education, while the application for mandamus was in the name of the High School Board, and

McCarthy, Q. C., thereupon asked leave to amend by making the application for the writ in the name of the Board of Education for the village of Morrisburg, contending that although the demand was made by the chairman, yet it was in effect the demand of the board.

Bethune, Q. C., in answer, argued that even then the application must fail, as the statute only allowed the demand to be made by the High School Board.

(a) See *Re Chamberlain and the Corporation of the United Counties of Stormont, Dundas, and Glengarry*, ante p. 26.

December 31, 1880. HAGARTY, C. J.—Having regard to all the proceedings, we find this case presenting some curious features.

The present applicants resolved on obtaining a site and erecting buildings, on the 11th March, 1878. On the 29th of April, 1878, they resolved to levy \$7,000 therefor, and on the 27th of May resolved to make requisition on the municipalities.

Before their next step the County Council passed (22nd of June, 1878,) by-law 590, abolishing this section No. 4.

The applicants still proceed, and on the 19th of July, 1878, make their formal demands on the municipalities.

They did this, therefore, with the full notice of the existing by-law abolishing or curtailing their district.

When my brother Galt (in April, 1880,) discharged the rules for mandamus, he considered it merely a question of costs, saying, "it was out of the question to make the rule absolute, the District No. 4 having been discontinued and abolished by by-law 617."

He considered that when the rules *nisi* were obtained in May, 1879, there was an existing High School District, but no existing High School.

It does not appear that his attention was called to the effect of the by-law 590, with its repealing clause unquashed. In the very full argument before us there was no attempt made to impugn the validity of the by-law of June, 1879, and it is beyond question, therefore, that the townships of Williamsburgh and Winchester have long since ceased to belong to District No. 4.

The applicants ask for a very strong exercise of power in the shape of the mandate of this Court to force these townships to pay six-sevenths of the sum of \$7000 required for High School purposes, while they were assumed to be joined to the village of Morrisburg. They have been separated by lawful authority, and in my judgment cannot now, under the circumstances, be legally called on to pay.

It was strongly argued on their behalf that when they made this demand they were legally entitled to make

it and that we must regard matters as they then stood.

But it is by no means clear that they had such right. Some time before their demand the united council professed to abolish their district, and I cannot see how they could assume to treat this proceeding of the council as a nullity.

This Division 4 seems to have existed under the by-law of October, 1877, as it repealed the by-law of 1876, which enacted that districts 6 & 7 should be dropped, and that the township of Winchester should become part of High School District No. 4, and that all by-laws inconsistent therewith should be repealed. Then, again, the by-law No. 590, as left by the Court, repealed that portion of 551 (the law of October, 1877,) relating to the county of Dundas.

Until set aside by authority, I think it should not have been so disregarded, and that these municipalities might well have declined levying such a heavy demand declared by the highest municipal authority to be no longer lawful to be imposed on their ratepayers. Until quashed, a by-law like this should be treated as existing, and would generally protect persons acting under it. I therefore consider that these demands were then rightfully refused.

The applicants aver that they purchased a site for this school for \$1,000. It is not stated when this was done, but I am fully warranted in assuming that this, as well as any other expense incurred, was with the fullest notice of the opposition to their proceedings, and from June, 1878, that the United Council had, as far as it could, dissolved the district.

Under such circumstances it was, to my mind, wholly unjustifiable on the part of the applicants to attempt to force on these townships this very heavy burden.

In the view I take it is not necessary to decide whether the unquashed clause in the by-law of June, 1878, did not put an end to the district. Even if it did not do so, I am very strongly of opinion that no case has been made out for our granting a *mandamus*.

By lawful authority the district has been abolished. No high school has been built, and the ratepayers, whom we are asked to compel to pay over \$6,000, have been legally withdrawn from any such liability.

I think the whole case fails, and that it is out of the question that we should grant the writs.

No case resembling the present in its circumstances has been referred to.

We are not called upon to discuss the case of an expense incurred in good faith by the trustees of a large section of country for a purpose common to all the ratepayers, and afterwards the cutting off by legislation or other lawful authority of half or two-thirds of the territory. When such a case arises, it can be dealt with on its merits.

The present case is totally different; and even in the possible case suggested, it may be that the legal withdrawal of a section of country from the area in which rates could previously be levied necessarily prevents any levy after such withdrawal, unless specially provided for by legislation.

In this view it is not necessary to discuss the motion to amend the names of the applicants. A mistake is conceded to have been made in the name, fatal unless amended. I certainly, in a case like this, would not make the amendment unless it should be made as a matter of right, and not of discretion or of grace.

I do not desire to refuse this application on any ground peculiar to the writ of *mandamus* prior to our modern legislation. I am willing to treat it as suggested by Moss, J. in *Stratford v. County of Perth*, 38 U. C. R., at p. 158, and to take his suggestion that it is a safe and convenient rule for a Judge to act upon principles similar to those which govern a Court of Equity in a "suit for specific performance."

I have always understood that when it is sought to enforce specifically the performance of bargains or of duties undertaken between parties, regard is had to alterations in their relations, or in the subject matter, or in the ability to

perform arising from changes in the law, or the interposition of *vis major*, &c., and that these should be especially considered in the case of public bodies.

I can suppose all these parties before us on a bill filed by these applicants to compel these municipalities to levy these amounts. Their case would be that they had legally demanded this money and should have it paid to them. The answer, as here, would be: "True it is you were then entitled to it for a purpose and object in which we were legally interested and bound to contribute and conform to; but since then our whole connection with you has been severed by lawful authority. Why should we be now forced to contribute to an object no longer common to us with you?"

I can fully understand the applicants urging that on the faith of the legal liability existing at the time of the demand they had spent moneys or incurred obligations, and ought in justice to be reimbursed. That would be a claim of very intelligible justice. But here, although only one-seventh of the original requisition has been expended, it is sought to obtain the other six-sevenths to complete the original design, in which the defendants are no longer legally interested.

I cannot understand on what principle such a claim can succeed. As regards, at all events, the unexpended portion of the demand, the old maxim might well apply, "*Cessante ratione cessat et ipsa lex.*"

The "ratio" as to Williamsburg and Winchester had ceased by operation of law, by their ceasing to belong to division four. Why should not the *lex* governing their liability therewith cease also?

Very serious consequences might flow from a rigid application of the argument that if the demand made were binding when made, no subsequent change in the relation of parties, or of the area of liability to contribute, can prevent its being enforced.

If some public board in this city had power by law to regulate the erection of, say a court house for the city and

county, and to require the respective municipalities to contribute ratably on demand therefor, and then demanded of the city \$100,000, and from the county \$100,000, to complete it, on an estimate of a total cost of \$200,000; and before any serious expenses had been incurred an Act was passed severing all connection for all purposes whatsoever between the city and county, or erecting the city into a wholly separate county in itself, I do not think a Court of justice would declare the county to be any longer liable to contribute the large sum demanded, though they were clearly responsible therefor at the time of the demand.

Their answer, to my mind, would be clear and satisfactory. "We are no longer liable to contribute to the city court house. We have ceased, by no action of our own, but by paramount authority, to have any interest therein." I think it would be a matter of regret if they were to be told that they must still raise and pay the money. I cannot distinguish between the case suggested and that now before us for judgment, so far as the principal of legal liability is concerned.

In the case put, I am giving the applicants the benefit of not considering the by-law of 1878, or its ultimately unquashed part, as affecting them. I am not discussing whether legal obligations, binding on the whole existing area of the division, might or might not have been created, as by bond or contract, so long as it legally existed. I have only to consider the case presented.

On this application we can only grant or refuse a mandate to levy the original amounts, and for the reasons given I think it should be refused, and with costs.

CAMERON, J.—It is contended on the part of the municipalities, although they were a High School District when the Board of Education passed their resolution to erect a new high school, before such school was built, and before any considerable expenditure had taken place, they had ceased to be a part of such high school district, and were not liable to contribute either towards the maintenance of

the high school, or towards the building of a new school house: that notwithstanding the quashing of by-law No. 590, while it was unquashed it was binding upon all parties affected thereby, and they were not then justified in raising the money required, and are not now liable to raise it.

On behalf of the Board of Education it is contended that it is of no consequence what the limits of the High School are now; at the time of passing the resolution to build the school house, and at the time of the requisition upon them to raise their proportions respectively, they were bound to contribute: that they, as municipalities, exist now as they did then, and the Corporation of the Board of Education exists now as it did then, and nothing that has transpired since their demand without their consent, and against their will, can deprive them of a right once accrued.

It appears to me the contention of the board is well founded, and entitled to prevail. By section 30, of chapter 205, R. S. O., under the head "Assessments for High School purposes—(1) *Obligatory*"—it is provided * * * that "in cases where two or more municipalities, or portions thereof, within the county, have heretofore been formed into and constitute one High School District, or in cases where two or more such minor municipalities, or portions thereof, agree to form and constitute themselves into a High School District, then such other sums as may be required for the maintenance and school accommodation of the said High School, *shall* be provided by the High School District upon the application of the High School Board, and such sums shall be raised in the manner provided in the next following section of this Act; but nothing in this section shall be construed to affect any existing suit, or to prevent the County Council from discontinuing any High School District heretofore formed by it."

Section 31. "The council of any municipality, or the councils of the respective municipalities which may be liable therefor, shall, upon the application of the high school board, raise the proportion required to be paid by such municipality, or part of the municipality, from the

whole or part of the municipality, as the case may be" * *

Under these provisions there can be no doubt, if the high school district existed as at the time of the requisitions upon the municipalities of Williamsburg and Winchester, they would have been bound to raise the sums required of them. See *In re Niagara High School Board and the Corporation of the Township of Niagara*, 39 U. C. R. 362, affirmed in Appeal, 1 App. R. 288. And the Court must be guided, not by considerations of the seeming hardship of making municipalities contribute to the support of schools from which their territory has been legally disconnected, a hardship that is in the present case more in sound than in reality, as the townships may derive now as much benefit directly and indirectly from the school as when they formed part of the high school district, but by what were the legal rights of the board at the time of the demand upon the municipalities.

The action of the County Council in 1879 could not relieve them from liabilities to which they were subject in 1878, and failed to meet. The by-law that was quashed is as if it never existed, and does not in any manner affect the legal rights involved in the question before the Court.

The rule should be made absolute, with costs, for a peremptory *mandamus* to the respective corporations of the townships of Winchester and Williamsburg, to raise and pay over to the treasurer of the Board of Education of the incorporated village of Morrisburg the sums mentioned in the requisitions made upon them respectively.

The objection to the entitling of the rules was not made when the rules were argued in the single Court before Galt, J., and as the demand was properly made in the right name the rule may be amended, without costs.

ARMOUR, J., concurred with CAMERON, J.

Rule absolute, with costs.

MEMORANDA.

The following gentlemen were called to the Bar during this Term :

PETER CLARKE McNEE, THOMAS EDE, ROBERT HILL MYERS, ALFRED DUNCAN PERRY, FREDERICK COVERT MOFFATT, EDWARD BETLEY BROWN, WILLIAM NESBIT PONTON, PAULUS ÆMILIUS IRVING.

IN THE COURT OF QUEEN'S BENCH.

Regula Generalis.

Michaelmas Term, 44 Victoria, 1880.

IT IS ORDERED, "That the length of this present Term of Michaelmas in this Court for the transaction of the business of this Court be increased, and that the same shall continue until Friday next, the tenth day of December instant, inclusive."

SITTINGS IN VACATION,

AFTER MICHAELMAS TERM.

CRATHERN ET AL. V. BELL.

Guarantee—Construction.

Declaration on a guaranty, by which in consideration of the plaintiffs accepting three notes of G. for \$751 each, in satisfaction of their claim against G. & Co., defendant did “to the extent of \$751 guarantee the payment of the first two of the said notes according to their tenor and effect ”

Pleas, 1. That the notes were payable to plaintiffs’ order, and the plaintiffs endorsed the first note to certain persons who held it at maturity, and to whom, in the event of G. not paying it, the plaintiffs were liable as endorsers: that G. notified defendant of his inability to pay it in full, and defendant paid thereon \$276, of which plaintiffs had notice, and afterwards G. failed to pay the second note, whereupon defendant paid the plaintiffs \$476, being the balance of the sum of \$751 guaranteed by defendant. 2. That the first two notes, to the amount of \$1,276, were paid to plaintiffs as they became due, whereby defendant’s guarantee was satisfied.

Held, on demurrer, pleas bad; for, as to the first, defendant was not liable to the plaintiffs endorsees, and no express or implied request by the plaintiffs to pay was shown; and as to the second, the guaranty was not satisfied by the payment by G. of \$751.

DECLARATION upon the following guaranty, made by the defendant:—

“ BELLEVILLE, 5th May, 1879.

“In consideration of Messrs. Crathern & Caverhill, of Montreal, accepting the promissory notes of James Glass, of Belleville, at four, eight, and twelve months, dated the 28th of April, 1879, for \$751 each, in full satisfaction and discharge of their claim against the late firm of James Glass & Co., Belleville, I hereby do, *to the extent of \$751*, guaranty the payment of the first two of the said notes, as they mature, according to their tenor and effect.”

The declaration averred that the plaintiffs accepted the notes of Glass, as in the guaranty set forth, in full satisfaction and discharge of their claim: Breach, that Glass did not, nor did the defendant, pay to the plaintiffs the first two of the said notes, although the same were overdue and unpaid, and the second note, viz., the note payable at eight months after date, remained overdue and unpaid, and the defendant was liable thereon to the amount of the said sum of \$751 and interest thereon.

Pleas :

1. That the notes in the guaranty mentioned were payable to the order of the plaintiffs, and before the maturity of the first note the plaintiffs endorsed and for value transferred the said note to certain parties, who, at the maturity thereof, were the lawful holders thereof, and to whom, in the event of Glass not paying the same, the plaintiffs were liable thereon as endorsers: that after the making of the guaranty and the acceptance thereof by the plaintiffs, and on the maturity of the first of the said notes, Glass, being unable to pay the full amount thereof, notified the defendant of his said inability; and that on the note, and in part payment thereof, and before the commencement of this suit, he paid to the holders of the said note the sum of \$276, that being the extent to which the said Glass was unable to meet and pay the same, of all which the plaintiff before the commencement of this suit had notice; and that afterwards, on the maturity of the second of the said notes, that is the note due at eight months for \$751, the said Glass failed to pay the same, whereupon the defendant before suit paid the plaintiffs \$476, being the balance of the sum of \$751, to the extent of which the defendant had guaranteed the first two notes in the said guaranty mentioned, of all which the plaintiffs had notice.

2. That after the making of the guaranty, and after the delivery of the said notes to the plaintiffs, and as the same became due, the first two notes, to the amount of \$1,276, were paid to the plaintiffs; that is to say, the said two notes, to an amount far in excess of the sum of \$751,

were paid to the plaintiffs before the commencement of this suit, whereby the guaranty was satisfied, &c.

Demurrer, to the first plea: (1) The payment of each of the notes of \$751 each by the said Glass was guaranteed by the defendant, and as default was made by Glass, the defendant was liable to the plaintiffs upon the guaranty to the amount of \$751. (2) The dealings between the defendant and Glass in no way affected the question of the defendant's liability to the plaintiffs upon the guaranty sued upon. (3) The guarantee was, that each note would be paid, and default having been made there was a breach of the guaranty, and the defendant was liable to the extent of \$751. (4) No averment of notice to the plaintiffs at the time of the payment of \$276, and the plaintiffs were not parties or privies to such payment.

To the second plea: (1) The guaranty was not that a part of the notes should be paid, but that each note should be paid in full, and the breach was that the second was not paid.

2. The guaranty was not satisfied by payment of any part of the notes, and could be satisfied only by payment of each note in full, or by payment by the defendant to the plaintiffs of the deficiency, or to the amount of \$751.

December 3, 1880. *B. M. Britton*, Q. C., for the demurrer. There was no default by the guarantor until non-payment of the second note. Any arrangement made between the guarantor and the principal debtor, or the holder of the first note, could not affect the plaintiffs; and the payment of that note by the guarantor was in effect a payment by Glass, and the plea is not good without an averment of notice to the plaintiffs before payment. He cited *DeColyar* on Guarantees, 26, 27, 165, 190, 256, was cited.

Bethune, Q. C., contra. The guaranty was in effect a guaranty that Glass should pay \$1,502, to the extent of \$751, and being a guaranty of negotiable notes, the holder of any note was entitled to the benefit of it, and might deal with the guarantor.

January 21, 1881. OSLER, J.—As to the first plea. I read this instrument as a continuing guaranty of the first two notes to the extent of \$751. So long as Crathern & Caverhill, the guarantees, were the holders of those notes, no difficulty could arise. The guaranty was divisible. If the principal debtor made default upon the first note, in whole or in part, they could have recovered the deficiency upon the guaranty; and so as to the second note, to the amount to which the guaranty had not been exhausted in making good the first, paying no more than \$751 in all. But it was not a negotiable instrument, and the guarantee's endorsees of the first note could have maintained no action upon it: *Brandt* on Suretyship, 43, 45; *Daniel* on Negotiable Instruments, vol. ii., p. 693; *Story* on Bills, secs. 457, 458; *Parsons* on Bills, vol. ii., p. 132; *Watson v. McLaren*, 19 Wend. 557; *S. C.* 26 Wend. 425; *Palmer v. Baker*, 23 C. P. 302; *Story* on Promissory Notes, 7th ed., p. 662; nor could they, except possibly in the event of the insolvency of the guarantees and the maker, have enforced it to any extent for their benefit: *Ex parte Waring*, 19 Ves. 345; *Banner v. Johnston* L. R. 5 H. L. 157, 174; *Powles v. Hargreaves*, 3 De G. McN. & G. 450; *Ex parte Lambton*, L. R. 10 Ch. 405; *Alchin v. Buffalo*, 23 Gr. 411; *In re Morton*, 3 App. 202. It is not averred that the guarantees intended to give their endorsees any interest in the guaranty, and as they retained the second note, to which it was applicable, it must be inferred that they intended to retain the benefit of the guarantee also. Therefore the mere payment to the endorsees of the first note is no defence to the guarantor. The point of his plea is, that the plaintiffs were liable as endorsers of the first note, to pay it on Glass's default, the deduction being that if they had done so they could have compelled the defendant by an action on the guarantee to repay them, and so the defendant's payment enured to the plaintiffs' benefit.

My difficulty, however, is, to see the precise legal ground on which this can be a defence. It is not said that there was any express request by the plaintiffs to the defendant

to pay the endorsees, and he was not, as I have shewn, under any legal compulsion to pay them.

In the notes to *Lampleigh v. Brathwait*, 1 Sm. L. C., 7th ed., 148, it is said that the request to pay money to the defendant's use, if not made in express terms, will be implied under the following circumstances: "First, where the consideration consists in the plaintiff's *having been compelled to do* that to which the defendant was legally compellable. Second, where the defendant has *adopted* and enjoyed the benefit of the consideration, for in that case the maxim applies, *omnis ratihabitio retrotrahitur et mandato æquiparatur*. Thirdly, where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, *expressly* promises. Fourthly, in certain cases where the plaintiff *voluntarily* does that to which the defendant is *morally*, though not *legally*, compellable; and the defendant afterwards, in consideration thereof, *expressly* promises." In the two former cases the law implies the promise as well as the request. In the two latter the promise is not implied, and the request is only implied when there has been an express promise.

Is there anything shewn here from which the law will imply a request? The plaintiffs' liability to their endorsees will not do, for the defendant not being bound to discharge it, his payment in supposed relief of the plaintiffs was voluntary, and it might well be that such a state of facts existed between them and their endorsees that their liability would never be enforced, or that it would be discharged on some terms less advantageous than payment in full, so that they would retain, as they may have intended to do, the security of their guaranty in respect of the second note alone.

In the absence of an express request, or circumstances from which the law would imply a request, I think the defendant cannot avail himself of the payment to the endorsees of the first note as a partial discharge of his guaranty.

It appears to me to have been a voluntary payment, or one made at the request of Glass, the principal debtor. If it had appeared that the defendant had taken up or became the holder of the first note on paying it, so that he had a right of action against the plaintiffs on their endorsement, then, in avoidance of circuity of action, the payment might have been a defence. Nothing of that kind, however, is shewn.

The second plea is also bad, because it treats the guaranty as not being what I hold it is, viz., a continuing guaranty. In substance, the defence set up in that plea is that the guaranty was satisfied by the payment by Glass of \$751. I think that is not its meaning. If Glass paid the first note in full, it nevertheless remained available as guaranty of the second.

I think the plaintiffs are entitled to judgment on the demurrer.

Judgment for plaintiffs on demurrer.

RE EGLESTON AND TAYLOR.

Award—Practice.

Where the reference was only for the purpose of ascertaining and awarding the damages sustained by the plaintiff by a fire negligently set by the defendant, and the defendant agreed to pay the amount awarded; and it was provided that the costs of the arbitrators and award, &c., should be paid by the party entitled thereto, in whose favour the award should be made,

Held, that the arbitrators had no power to give a month for payment of the sum awarded, or to direct that the defendant should pay the costs, but that these directions were severable from the rest of the award, and might be rejected.

In such a case the proper course is to discharge generally a rule to set aside the award, not to make it absolute in part.

November 30, 1880. *Spencer* obtained a rule *nisi* to set aside an award on the grounds, amongst others, that the arbitrators exceeded their powers in giving Taylor a month after publication and notice in writing of the award to pay the damages, and had no power to limit or allow any time for payment, or impose the conditions of giving notice in writing. 2. That the arbitrators had no power over the costs.

The submission was to two arbitrators, with power to choose a third, the award of a majority to be binding. It recited that a fire, negligently set by Taylor, had destroyed a quantity of timber trees and wood belonging to Eggleston: that Taylor had agreed to pay the damages without litigation; and that to ascertain in a fair and just manner the amount of the damage the parties had agreed to refer the question to arbitrators. The parties then agreed to be bound by the valuation, assessment, and award, as to the amount of damages caused by the fire to the same extent as if they had been recovered by the verdict of a jury in a Court of law; and Taylor agreed to pay Eggleston the amount awarded. There was a provision that the costs and expenses of the arbitrators and of drawing the submission and of the award, &c., should be paid by the party entitled thereto, in whose favour the award should be made.

The submission gave the arbitrators no power over the costs.

By their award the arbitrators determined that there was due to Egleston from Taylor \$110 for damages in respect of the fire, and they awarded and directed that Taylor should pay that sum to Egleston, or his order, within one month after the publication of their award and notice thereof in writing given to Taylor; and they further awarded and directed that the costs and expenses of the arbitration, or of the arbitrators, and of drawing the agreement for arbitration, and of the award, and of any necessary legal consultation and attendances connected therewith, should be paid by Egleston.

December 21, 1880. *Rose* shewed cause. As to the points relating to the costs and as to giving Taylor a month after notice of the award for payment, that part of the award directing Egleston to pay the costs, is valid and within the power of the arbitrators; and if not, it should be treated as mere surplusage. The submission provides for the payment of costs, and the award merely repeats or echoes the provision of the agreement of submission in this respect. The arbitrators had power to limit a time for payment of the amount awarded.

Spencer, contra. As to that part of the case as to which payment was reserved, the arbitrators had no authority over the costs, and that part of their award is bad. By the submission the costs are to abide the event, and in such cases the award should be silent respecting costs: *Russ.* 5th ed. 376; *Unstead v. Kid*, 1 Chitty 526. The awarding on the question of costs being a clear excess of authority, forms a good ground of motion: *Russ.* 668; *Boodle v. Davis*, 3 A. & E. 200. The award is also bad for appointing a month's time for payment after notice of the award. In this case all the arbitrators were empowered to do was to *fix the amount* of damages which Egleston had sustained. There was no other question submitted to them. Taylor's liability for the burning was admitted by the terms of submission. The case is precisely analogous to cases where it is left to an umpire to name the price of an article or of land to be paid

by one party to the other, in which cases it has been held that the umpire has no power to appoint a *time* for payment. See *Emery v. Wase*, 8 Ves. 506, 512; *Addison v. Corbey*, 11 U. C. R. 433; *Hill v. Hill*, 11 U. C. R. 262; *Thompson v. Anderson*, L. R. 9 Eq. 523, 529. In *Emery v. Wase*, *sup.*, Lord Eldon's opinion was, that this was not a mere matter of excess which could be eliminated, but that it rendered the whole award bad.

January 21, 1881. OSLER, J.—In the case of the *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 Ex. 221, 229, Blackburn, J., says: "An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case, by a statute and no other. And from this it follows, that if that limited authority has not been pursued, and the arbitrator has awarded something beyond the authority, the award is *pro tanto* void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether; otherwise those against whom the award is made, would be compelled to fulfil the void part."

In *Rees v. Waters*, 16 M. & W. 263, the reference was of an action of replevin, the arbitrator having the same power as a Judge at *Nisi Prius*. He ordered the same damages and costs to be paid at a certain time and place. It was held that that part of the award was void as surplusage. The rule to set aside the award was discharged.

Re Goddard v. Mansfield, 1 L. M. & P. 25, decides that if an award is good in part and bad in part, and the latter can be separated without prejudice to the rest of the award, that part will be rejected; but the Court will not make absolute the rule to set aside that part, but will discharge it generally.

In *Russell on Awards*, 5th ed., p. 410, and *Redman on Arbitration*, p. 117, it is laid down that arbitrators may name a day and place for paying the amount awarded. There are, however, as Robinson, C. J., points out in *Addison v. Corbey*, 11 U. C. R. 433, certain exceptions to this

rule, viz., where a cause only is referred, or where a reference is made for no other purpose than to fix a price or make an estimate, or where the terms of the submission contain something restricting the arbitrators in this respect.

In *Benwell v. Hinxman*, 1 C. M. & R. 935, where the case had been referred, Baron Parke said: "There is no doubt the arbitrator had no authority to give day of payment. So far he has exceeded his authority, and so far the award is invalid, but it is valid for the rest."

Commenting on this case in *Addison v. Corbey*, 11 U. C. R. 435, Robinson, C. J., said that Lord Eldon seemed to have leant to the contrary conclusion in *Emery v. Wase*, 8 Ves. 519, doubting whether time of payment had not some connection with the price.

In the case before me, the reference was clearly made only for the purpose of ascertaining or valuing the damage. It is spoken of in the submission as a "valuation" and "assessment." The liability was admitted, and Taylor covenanted to pay the sum awarded.

Where all matters in difference are referred, and the arbitrators are to ascertain what, if anything, is due by one party to the other, they may very fairly, unless restricted by the submission, give a reasonable day for payment, and even impose other terms, such as directing one party to execute a bond of indemnity to the other—*Anderson v. Cotton*, 2 P.R. 109—or to execute mutual releases respecting the matters referred: *Goddard v. Mansfield*, 1 L. M. & P. 25; and see *Re McLean v. Jones*, 2 C. L. J. N. S. 206. But where their duty is limited to fixing a price, or assessing a sum for damages which the parties have agreed to pay on being fixed by them, they have no power to go beyond the special terms of the submission in that respect. For this reason I think their direction in this case to pay in one month after the publication of their award and notice in writing thereof, was unauthorized and void; and so also was their direction as to costs.

Both these directions are, however, clearly severable from the rest of the award, which contains in a separate sentence

a distinct finding and award that there is due and owing to Eggleston by Taylor \$110 for damages in respect of the fire complained of.

It is not easy to see what possible connection there can be here between the price and the time of payment. The shortness of the time given precludes the idea that it had any effect upon the amount of damages awarded.

The award is therefore void only *pro tanto*. The matters complained of are surplusage, and the rule must, in accordance with the authorities referred to, be discharged.

See also *Barnes v. Boomer*, 10 Gr. 532 ; *Boyle v. Humphreys*, 1 P. R. 187 ; *Jones v. Reid*, 1 P. R. 247 ; *Lund v. Smith*, 10 C. P. 443 ; *City of Toronto and Leak*, 23 U. C. R. 223 ; *Re Middlesex and the City of London*, 14 U. C. R. 334 ; *Vanburen v. Bull*, 19 U. C. R. 633.

HILARY TERM, 44 VICTORIA, 1881.

From February 7th to February 19th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

SMITH V. FAUGHT ET AL.

Ejectment—Will—Restraint upon alienation.

A direction in a devise in fee simple that the devisee should “not sell or cause to be sold, the above named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper :”—*Held*, a valid restraint upon alienation.

Held, also, that the giving of a mortgage by the devisee, was not a violation of the restraint.

EJECTMENT for lot 20, in the 9th concession of Wilberforce.

The defendant Samuel J. Faught defended for all land claimed. The others did not appear. The plaintiff claimed as mortgagee of defendants Lawrence G. and Annie Faught, the mortgage being dated the 29th June, 1875, Annie Faught being then seised in fee. The defendant Samuel J. Faught denied title and claimed: (1) under the Statute of Limitations, (2) under a power of appointment and trust in the will of Samuel Lett, 14th of March, 1870, exerciseable only in favour of any of the children of the donee or trustee, the defendant Annie Faught, which power of appointment was executed in favour of her son, the defendant Samuel, and dated the 9th March, 1878.

The case was tried at the last Fall Assizes at Pembroke, before Hagarty, C. J. The seisin of Samuel Lett was admitted. Annie Faught was his daughter, married to the defendant Lawrence Faught. The will (14th March, 1870,) granted to his daughter, Annie Faught, this lot. It then proceeded: "I, Samuel Lett, do furthermore say that my beloved daughter, Annie Faught, shall not sell or cause to be sold the above named lot, or any part thereof whatsoever, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper. Furthermore, the said Ann Faught shall take possession of said land after my death, but not until then."

The testator died on the 14th September, 1871.

On the 29th of June, 1875, Annie Faught and her husband executed a mortgage in fee of this land to the plaintiff, to secure \$422.85 in four annual instalments. The mortgage was in default.

On the 9th March, 1878, Annie Faught and her husband conveyed this land by bargain and sale in fee to her son, the defendant Samuel, "in consideration of natural love and affection, and of the powers and trusts contained in the last will and testament of Samuel Lett, deceased, and of the sum of \$1." This deed was under the short form of Conveyance Act.

This was proved on the defence, and it was then objected that the restraint in this will on alienation was valid in the case of a married woman, and her mortgage invalid: that in any event it could only confer a title available after her death; and that her execution of the mortgage worked a forfeiture. It was admitted that there were three other children of Samuel Lett, besides Annie Faught, who was living; and that the verdict could only be for one-quarter if the mortgage worked a forfeiture.

A verdict was entered for the plaintiff.

November 18th, 1880. *J. K. Kerr*, Q.C., obtained a rule *nisi* to enter a verdict for the defendant under the C. L. P. Act.

December 6, 1880. *T. D. Delamere* shewed cause. The document put in at the trial is a testamentary document, and the restriction contained in it does not extend to mortgaging: *Re Macleay*, L. R. 20 Eq. 186, *per* Jessel, L. J. If it do extend to mortgaging, the restriction is so absolute as to be of no avail: *Theobald* on Wills, 316 *et seq.*, and cases there referred to. The fact of the beneficiary under the will being a married woman can make no difference as to the validity of the restriction, as the will does not give the property to her as a separate estate in equity, but her estate is by statute a legal one, and the reason therefore of the distinction in the case of a married woman is gone: *Theobald*, 322 *et seq.*

Kerr, Q.C., *contra*. The will at most gives a life estate: *Re Macleay*, L. R. 20 Eq. 186. The restriction is valid because the beneficiary is a married woman, and because it is not an absolute restriction. The attempt to convey worked a forfeiture. He cited *Smith* on Real and Personal Property, sec. 238, and cases there referred to; *Pennyman v. McGrogan*, 18 Gr. 132; *Gallinger v. Farlinger*, 6 C. P. 512; *Earls v. McAlpine*, 27 Gr. 164.

February 12th, 1881. HAGARTY, C. J.—The question is very important. We have first to consider the restraint on alienation; and secondly, if it be valid, has it been violated by this mortgage? In this case the devise to the daughter by itself would convey the estate in fee which the testator had. In default of her making any appointment it would pass to her heirs. She has assumed to exercise the right of appointment in favour of the defendant, her son, subsequent to her giving the mortgage. The general law is considered in the judgment of Sir Geo. Jessel, M. R., *In re Macleay*, L. R. 20 Eq. 186, (1875.) There was a devise to the testatrix's brother John of real estate, "on the condition that he never sells it out of the family." She gave legacies to nephews and nieces and the residue to her "dear brothers" and "dear sisters." The Master of the Rolls first holds that the condition is confined to the

devisee himself, and therefore not void on the ground of remoteness.

After noticing the well known doctrine that a condition that the feoffee shall not alien the land to any is void (*Co. Litt.* 222), he further quotes from the same: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." "So that," he says "according to Littleton, the test is, does it take away all power of alienation? * * The condition, therefore, whatever it may be, must not really take away all power, either by express words or by the indirect effect of the frame of the condition. That is the effect of the rule as laid down by Littleton. * * So that, according to the old books, *Sheppard's Touchstone* being to the same effect, the test is, whether the condition takes away the whole power of alienation substantially. It is a question of substance and not of mere form.

"Now you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale. A person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. * * Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail. * * So that this is strictly a limited restraint on alienation, and, unless *Coke* upon Littleton has been overruled, or is not

good law, this is a good condition." He then reviews the cases, and especially the apparently adverse view of Lord Romilly in *Attwater v. Attwater*, 18 Beav. 331.

I have quoted largely from this well-considered judgment, as it covers much of the ground in our case.

In *Earls v. McAlpine*, 27 Gr. 161, Blake, V.C., follows Sir G. Jessel's view of the law. *Pennyman v. McGrogan*, 18 Grant 132, is to the same effect. There was a devise in fee to a son, but not to be assigned to any person not a son of his for twenty years from testator's death. The son sold the lot within twenty years. The Court seems to think that it was a good restraint on alienation.

I am of opinion that the restraint on sale is good, that it is limited in its effect, and that it is reasonable.

As I read the will an estate in fee is devised to the married daughter. She then had and has children. She is allowed to grant as large an estate to any of her children as she had herself. She is simply restrained during her life from selling it to any other. I do not consider that the shape in which the restraint is directed can affect. It is not in terms made a condition, neither was it in terms a condition either in *Earls v. McAlpine*, or *Pennyman v. McGrogan*. See also, on this, *Doe v. Hawke*, 2 East 486.

Assuming it to be a valid restraint, it remains to consider whether its provision has been violated. The devisee "shall not sell, or cause to be sold," the estate devised. As I understand it, a restraint like this must be construed strictly. The act done must be a direct contravention of the provision.

According to Sir George Jessel's judgment, if correctly reported, a devisee so restrained is only prohibited from *selling*: "he may lease, he may mortgage, or he may settle."

I have not succeeded in finding any more direct decision. In most of the cases the words are much wider—"alienate, dispose of, mortgage, charge or encumber," &c., &c.—and there are many decisions as to their effect. Such a case as *Croft v. Lumley*, 6 H. L. 672, may be referred to. And

distinctions are pointed out between a direct and an indirect evasion of the restriction. For example, the giving in good faith of a warrant of attorney for a just debt is not generally held to be a charging or encumbering, although the natural result may be the creating of a charge. The devisee's act is not the proximate cause. But if done collusively, with the object of effecting by indirect means the prohibited object, it is otherwise.

The subject is treated in *Fisher* on Mortgage, secs. 158, 378. Where a power is given to sell for the purposes of a will it has been a much discussed question as to whether that confers a power to mortgage. The general doctrine is well considered by Lord St. Leonards in *Stroughill v. Anstey*, 1 DeG. M. & G. 635.

In *Bennett v. Wyndham*, 23 Beav. 526, Lord Romilly discusses it: "I think in the passage" (from the will) "which I have read, the word 'sale' expressly excludes the possibility of raising it" (the charge) "by sale of any portions of the estate, and I think the word 'sale' virtually includes within it the word 'mortgage,' which is practically a sale, and which cannot be resorted to without giving to the mortgagee a power of getting possession of the estate, if the charge is not paid off when required; for whether this is a power of sale contained in the mortgage or not, the mortgagee would have the power of foreclosure which is incidental to a mortgage, and the effect is practically the same."

But I do not think we can dispose of the question here by analogy to the execution of powers or of the rights of trustees or executors to mortgage. What we have to decide is, whether, assuming the restraint on sale to be valid, the execution of this mortgage is invalid.

There is no suggestion that it was given with any purpose of avoiding the restraint or "to cause to be sold" the land. I think the restraint, to be valid, must be limited, and be therefore construed strictly. The mere giving of a mortgage is not necessarily a sale of the property. It has been called "a conditional sale," but it in

no way reflects the ordinary idea of a sale. If the testator here had mortgaged the land and so devised it, it would be strange if his daughter and devisee could not have raised money by mortgage to pay off her devisor's mortgage, which she could not otherwise discharge. Refusing her such a power would defeat the very object of the gift, which was to preserve the estate to her and her appointee.

I am of opinion on the whole case that she had power to give this mortgage. The defendant, her son and appointee, takes the equity of redemption, but the mortgagee, the plaintiff, is, I think, entitled to his verdict.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

BARR V. DOAN.

Deceit—Fraudulent representation as to mortgage—Duty of purchaser of.

Defendant was mortgagee of plaintiff's farm, and the latter, being unable to pay the mortgage, asked defendant to buy the farm, and defendant offered him therefor some cash and a mortgage for \$619, representing to him that the mortgage was a second mortgage; that the land was as good as defendant's own land, and that any money lender would readily cash it at a small discount, thus inducing plaintiff, an ignorant man, to accept it, when in fact the defendant knew it was a fourth mortgage and almost worthless. After this an abstract of title was shewn to the plaintiff, but it did not appear that he read it or that it was read or explained to him.

The jury having found for plaintiff in an action for deceit, on motion for a nonsuit—*Held*, that there was no obligation on the plaintiff, as a matter of law, to examine the title or search the Registry Office, but that his omission to do so was matter for comment only; and that his having been furnished with the means of knowing, of which he did not avail himself, after the false statements had been made, was no answer to the action. *Seemle*, that on sustaining the verdict a reconveyance of the mortgage to defendant might be ordered.

Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant, and was made with intent to deceive, and did deceive the plaintiff, *Held*, that taking the whole statement together the verdict was unwarranted.

THE third count of the declaration, which was the only material one, stated that the defendant offered for sale, and fraudulently represented to the plaintiff that a certain mortgage, dated the 23rd of May, 1878, made by John Weddle to one Martin, and by Martin assigned to defendant, for \$619, was only a second encumbrance on the lands therein mentioned, and was subject to but one mesne mortgage, and that the property on which it was given was as good as defendant's own homestead, and that such mortgage was as good as cash, and would be cashed at once by any lender of money, whereby the plaintiff was induced to purchase such mortgage, and to pay defendant \$600 therefor; whereas in truth the land therein mentioned was encumbered by divers mesne mortgages to a large amount, and the property was not as good as defendant's homestead, and the mortgage was not as good as cash, and would not and could not be so cashed as represented by defendant, as

defendant then well knew, whereby the plaintiff lost all benefit and advantage he would otherwise have derived from being the purchaser thereof.

Plea, not guilty.

The case was tried at the last Toronto Summer Assizes, before Armour, J., and a jury, and a verdict rendered for the plaintiff.

It appeared that the plaintiff owned the north half of lot 33, in the second concession of East Gwillimbury, and the defendant was mortgagee thereof for \$3,300, at ten per cent. interest. Being unable to pay, he desired to sell the farm. He proposed to defendant to buy it, as well as his chattels. After some bargaining, which resulted in the defendant agreeing to purchase the place, and to pay for plaintiff's equity of redemption, together with some farm stock implements, about \$4,000, defendant offered him this mortgage for \$619, in part payment, and some cash. Plaintiff said he asked how much land it covered, and defendant said fifty acres. Plaintiff asked whether there were any other mortgages against it, when defendant said there was one—only one—that he was sure there was only one. Plaintiff said he did not ask the amount of that one: that he supposed as it was fifty acres it would not be a large mortgage, perhaps about \$600 or \$700: that he knew defendant was a keen man, and thought he would not have a bad mortgage. Defendant said that the quality of the land was as his own land: that the plaintiff could get the mortgage cashed in the city by any man lending money on mortgages, right off, and plaintiff would not lose a great deal. The bargain and representation were made on the 14th of October, 1878.

Plaintiff swore that defendant did not tell him to search the title; if he had done that, he would not have taken it. Plaintiff did not search the registry.

Plaintiff was closely cross-examined, especially as to his ignorance of the amount of the mortgage which defendant said was the only prior encumbrance, and as to the unimportance of the number of mortgages compared with their gross amount.

The plaintiff was an old man, and said he read with difficulty, and was not very clear in his answers. They went to Mr. Barwick to draw the mortgage. He transferred his farm to defendant, and received an assignment of the mortgage in question, and some money. They also went to get some papers at a Mr. Morgan's office. He saw some one there, but could not identify the person. He denied any statement made as to his being advised to search the registry, and in fact could not recall any conversation there. He said he tried, but could not sell the mortgage, and that it was worthless.

Wm. Mahoney proved that he had a \$500 mortgage on the fifty acres: that there were two mortgages ahead of him. and he paid them off, and the land was sold for \$1,300, he losing, as he said, about \$200. These three mortgages were all before the fourth mortgage assigned by defendant to plaintiff, and the result was, that his security was worthless.

David Graham proved that the defendant, before selling to plaintiff, was fully aware of the number and extent of the encumbrances, and he told defendant that his mortgage (*i. e.* that sold to plaintiff) was "worth but very little," or "worth nothing."

The only covenants in defendant's assignment to plaintiff were, that the mortgage was a good and valid security: that all the money was due and unpaid: that defendant had done no act to release it; and for further assurance.

A nonsuit was asked, and it was held that there was no cause of action proved on the first and second counts.

As to the third count, it was objected that there was no deceit proved, no amount stated as to the one mortgage: that there was no repudiation of the contract before action brought, and that the plaintiff should have searched the registry before buying. These objections were overruled.

The defendant swore that he told the plaintiff there were \$1,150 of encumbrance ahead of this \$600 mortgage, and that he mentioned each mortgage to him—that there were three. He denied telling him anything about getting the mortgage cashed, or that it was as good as cash: that he

would give him an abstract of the title : that they went to Morgan's office, and Woodcock, a clerk in his office, produced an abstract of the title and told the plaintiff what it was, and the plaintiff saw it, and that he told the plaintiff to search the title : that he said that was all right and fair. The defendant denied the conversation with Graham. He said he thought his mortgage was good security, and that the money could be got on it. He did not know if the abstract was read or explained to the plaintiff.

Mr. Barwick proved their coming to his office. He drew and they executed the assignment. He could not remember any conversation.

Mr. Woodcock remembered their coming to Morgan's office for title deeds. He heard the defendant tell the plaintiff he was going to examine the title to his (defendant's) property, and that the plaintiff had better examine the defendant's title. Witness said that would be the better course for both. Witness said to them he had the abstract of this property, and shewed it to the plaintiff, who was sitting by a desk. Witness laid the abstract down alongside of him and said : "There is the abstract of this lot. The plaintiff looked at the paper. He did not know if he read it or could read it, but he said nothing. They went away, witness retaining the abstract. The defendant said he was going to the registry office. The witness, when he produced the abstract, said to the plaintiff: "By the way, I have got an abstract here from Mahony, which may save you the expense of going up there and getting one," and he laid it before him. He did not read or explain it to him.

This took place on 15th October, 1878.

The abstract shewed several encumbrances.

Some evidence was then given as to the value of the land.

The learned Judge charged the jury as follows :—

"The defendant is alleged to have told the plaintiff that this was a second mortgage. The plaintiff says, 'I was acquainted with Doane, and I thought I knew that he was a man who would not have a bad mortgage.' He is not entitled to bring an action because he thought that

Doane would not have a bad mortgage; it must be on account of what Doane himself said. He says that Doane said that there was only one mortgage before that. If Doane did make that statement, and made it with the object of inducing the plaintiff to take the mortgage, knowing that it was not true, then the defendant would be equally liable as if he had told him that there was no mortgage at all, because it was done for the purpose of inducing the plaintiff to take the mortgage. Supposing that what Woodcock swears to is true, about this abstract being shewn to the plaintiff, I do not think that would in law deprive the plaintiff of his right to bring this action, if a deceit had been practised on him on the Monday evening, and he, still relying on that deceit, took this mortgage and was injured in taking it. It is evidence to go to you to lead you to say that this plaintiff was a careless man. Undoubtedly he was a careless man in one sense, but people have to be judged by the position in life that they are in. If the learned counsel or myself took a mortgage without searching the title, we would be very careless indeed; but we have to look at a man in the position in life of the plaintiff, and say how much he knew about registry offices and searchings. Illiterate men have to rely upon what is told to them. We have to look to the position of the parties and the circumstances proved before us, in order to say whether the plaintiff had a right to rely on what was told him. If Doane had never told him anything about it, and had said, 'You may go and search,' then he would not be liable at all. He is only liable if he made the statement in question, knowing it to be false; and if the plaintiff acted on it believing it to be true. In all these cases we have only the statement of the plaintiff and defendant. The plaintiff is bound to make out his case to your reasonable satisfaction; if he fails to do that, he ought not to recover."

The jury found \$668 for the plaintiff on the third count, and for the defendant on the other counts.

In Trinity Term last, *McCarthy*, Q. C., obtained a rule *nisi* for a nonsuit, on the ground that there was no evidence of deceit in the alleged statement that there was only one mortgage on the land, the amount of which was not stated: that there was no evidence of repudiation of the contract by the plaintiff: that the contract being one

relating to transfer of land, and the deceit alleged being as to title, there was a duty cast on the plaintiff to enquire as to the vendor's title, which he neglected: that on the plaintiff's failure to discharge such duty, and there being no evidence of any means used on the defendant's part to throw the plaintiff off his guard, the plaintiff could not recover, and the rule *caveat emptor* applied; or for a new trial on these grounds; and for misdirection in telling the jury that although Woodcock's evidence was true, it would not deprive the plaintiff of his right of action if the defendant's statement previously made was false; and for nondirection in not telling the jury that the plaintiff was bound to pursue the ordinary course of examining the title.

November 27, 1880. *Hagel* shewed cause. The plaintiff relies on the fact of the representation that the mortgage would be cashed in Toronto by any one dealing in mortgages, and that there was only one mortgage on the property, as shewing deceit, and the jury have so found. There is nothing in the conversation alleged to have taken place in Morgan's office, where Woodcock was the witness, to take away the appearance of fraud; in fact, taking Woodcock's own statement, he went into a private room with Doane, and on returning, after some conversation, Doane suggested to plaintiff that he had better look into the title, and Woodcock then said, "I have an abstract," and went into the room and produced it. He did not read or explain it, nor did plaintiff read it, to his knowledge. Plaintiff contends that this does not relieve the defendant of the consequences of the fraud of the Monday before: that it in fact confirms it if the plaintiff still depended upon his statements; and the jury having so found, the verdict ought not to be disturbed. The charge is a proper exposition of the law, and left the question properly to the jury. As to the point taken in the rule, that the plaintiff must have first reconveyed before the action can be maintainable, the plaintiff relies on *Adams v. Nelson*, 22 U. C. R. 199, as shewing that the plaintiff can maintain his action without having executed a reconveyance. That

case shews that if the mortgage in question had been given for or in lieu of promissory notes, the plaintiff must first reconvey before he sues on the notes, the original liability; but here the plaintiff does not resort to any prior cause of action; he accepts the mortgage and sues for the deceit, and is entitled to such damages as he may have suffered in consequence of such deceit. On the main question of what is sufficient to sustain the action of deceit, *Thomas v. Crooks*, 11 U. C. R. 579, is relied on. This was an action for money had and received, and the plaintiff failed, it being suggested that the action should have been in deceit. This case shews what deceit is sufficient to sustain the action, and is relied on by the defendant, and was cited at the trial. See language at pages 586, 588.

McCarthy, Q. C., contra, abandoned the contention that plaintiff should have reconveyed or offered to do so before suing, and admitted that if any artifice was used to prevent it or throw the plaintiff off his guard, the action could be maintained. He submitted that the evidence shewed none such; and that the learned Judge was in error in saying that although the evidence of Woodcock was true, it would not necessarily deprive the plaintiff of his right of action; that it was calculated to give the jury the impression that the defendant could not, at Morgan's office, relieve himself of the consequences of any statements he may have made before. He also contended that the intelligence of the parties ought not to influence the jury in arriving at their verdict, as to whether deceit prevailed or not. He relied on *Thomas v. Crooks*, as laying down the law bearing upon this case, and submitted that no such facts had been proven as to bring it within the principle there laid down.

February 12, 1881. HAGARTY, C. J.—As to the misdirection noticed in the rule. Woodcock's evidence was, that he produced an abstract, told the plaintiff that it was an abstract, and that the latter could have read it if he pleased.

Woodcock does not swear that he informed the plaintiff of the number of encumbrances, or in any way gave him information to make him know or suspect that what the defendant had previously told him was false. He merely furnished him with means of knowledge had the plaintiff chosen to avail himself of them.

Therefore I do not see that the objection, as taken, should prevail.

If it had been proved that the plaintiff was expressly told of the other encumbrances, I think the case would have to be reconsidered.

It is complained, also, that the jury should have been told that the plaintiff was bound to have examined the title.

I think it could not have been so directed as a matter of law. The law does not compel a person to search; and if a fraudulent representation as to the title were made with a view to the plaintiff acting upon it, then if he did act upon it, relying on its correctness, to his detriment, the action seems sustainable. It is always a matter well worthy of remark, that he does not choose to search when the records are readily available, and when he could have at once ascertained the true state of the title.

The third objection in the defendant's rule involves much the same point, that it is the vendee's duty to search, and that there was no evidence of the defendant using means to throw him off his guard, and that the rule of "*caveat emptor*" applies.

The rule reported to us as laid down at the trial was, that if any person makes a false representation to another, knowing that it is false, with the intention of inducing that person to act thereon, and that person does act on it and is injured, he is entitled to recover.

If on such a direction a jury find for the plaintiff, it must be on the assumption that there was a design to deceive and to induce the other to accept it as true, and to govern himself accordingly; or, in other words, to accept it instead of information which could have been obtained by a search.

As to the second objection, that there was no evidence of repudiation of the contract.

This, though formally taken at the trial, does not seem to have called for any argument or express ruling thereon. It certainly, if mentioned, was not pressed on our attention on the argument of the rule.

I presume we have the power now to direct that the plaintiff shall, if the verdict be upheld, execute a reconveyance of the mortgage to the defendant. The property has, I understand, been sold under the prior mortgages. The covenant to pay of the original mortgagor may possibly be worth a re-assignment.

The main difficulty of the case occurs on the first point taken in the rule, that there was no evidence of deceit in stating there was only one mortgage, the amount of which was not stated. I have very fully considered this point; first, on the argument on setting aside the nonsuit granted at the first trial, and again on this motion.

It was argued with great force that the one mortgage stated to be on the land might have been for as large an amount as, or even greater than, the three mortgages actually on record, and that therefore the plaintiff could not have been deceived, or if deceived the deception was not the natural consequence or result of the statement.

We must take the statement altogether, that there was only one mortgage before it: that the property was as good as the defendant's own land: that the mortgage was as good as cash, and would be cashed at once by any lender of money. It is not easy for us to weigh accurately the effect that such a statement would naturally have on the mind of a man of not very high intelligence.

The jury have, in effect, found that it was false to the knowledge of the defendant, and made by him with intent to deceive, and with the design of its being acted on to the plaintiff's injury. Unless we are prepared to hold that such a statement, though false, could not have so acted on any man, I do not see how it could be withdrawn from the jury.

The plaintiff, I think, had a very strong belief that a man like defendant would not have held a bad mortgage. This of course, by itself, would be nothing. But an assertion that there was only one mortgage, while there were really three, may, and I think probably did, exercise an important influence on plaintiff's mind. Taking a second mortgage, and taking a fourth mortgage, even without knowing the amount of each, might naturally appear a very different thing to the mind of an ignorant man. The very number of the encumbrances might startle. He states that his idea was, that as it was only fifty acres, perhaps the one mortgage might be \$600 or \$700. The statement that there was only one was false, and defendant so knew it. It may be plausibly urged that if such a falsehood did in fact have the injurious effect, it is not for the defendant to argue that it ought not or could not have such an effect.

Taking the whole representation together, I am unable to say, as a matter of law, that it was not for the jury to decide that it was capable of having the injurious effect sworn to. They in effect decide that it had such effect, and I think it was for them to say whether, as made, the reasonable result was to the injury of the plaintiff.

The verdict is not moved against on the weight of evidence. It was wholly for the jury. Had they found for the defendant, I think such a verdict would have been fully warranted. I regard with much apprehension the effect of allowing evidence of verbal statements made by parties to a transfer of land evidenced by a written contract with covenants bearing on the title. At the same time we must feel that purchases have been from time to time set aside, or damages recovered, in consequence of false representations made by vendors, with intent to deceive, as to the position, extent, existence of improvements, &c. It is too late now to question the right to maintain such actions. We may trace the history of the doctrine in such a case as *Pasley v. Freeman*, and the copious commentary on it in 2 Sm. L. C. 66. See also notes to *Chandler v. Lopus*, 1 Sm. L. C. 183; *Bigelow* on Fraud, 64 *et seq.*

The head note to the case of *Slaughter v. Gerson*, 13 Wallace Sup. Ct. U; S. 379, states the law rather too broadly for anything said in the case. The judgment adopts the view taken by the House of Lords in *Small v. Atwood*, 6 Cl. & Fin. 232. The vendor had made certain statements. The purchasers not relying thereon deputed some of their directors, with experienced agents, to ascertain the correctness of these statements. These persons examined and reported receiving from the vendor every facility, &c. It is said in the Supreme Court that the Lords held the contract could not be rescinded, not merely because there was no proof of fraud, but because the purchasers did not rely on the vendor's statements, but tested their accuracy, and with full knowledge declared they were satisfied, holding, that if a purchaser, choosing to judge for himself, did not avail himself of the knowledge or means of knowledge open to him and his agents, he could not be heard to say he was deceived by the vendor's representations, the doctrine of *caveat emptor* applying in such a case.

It should be the duty of Judges always to warn jurors of the necessity of requiring reasonable strict proof of a knowingly false statement.

The jury here have accepted the plaintiff's account of what took place, and refused to accept the defendant's denial. I have already noticed Mr. Woodcock's evidence, and the points on which it fails fully to support the defendant. It is more than probable that the plaintiff, if offered an abstract of title, would not have comprehended what such a paper meant; and even if told that he had better search the registry, may have chosen to rest contented with what he had been told by the defendant.

Even if we were asked to send the case down again on the weight of evidence, I hardly think that the defendant would fare better. A jury would again probably sympathise with an ignorant vendee, who in some shape or other had been induced to accept what is shewn to have been an almost worthless security, as payment for his land, to the extent of \$600.

It seems to me impossible to hold that a vendee, relying wholly on a vendor's representations, is barred from all redress merely because he did not avail himself of other means accessible to him to test their correctness.

The subject is treated at large in Mr. *Bigelow's* Treatise on Fraud.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

COOPER V. HAMILTON.

Statute of Limitations.

John C., being owner in fee of the land in question, sometime after 1854 placed his brother James C. in possession, rent free. In 1867 defendant, having married a daughter of James C., went to live with the latter and occupied part of the house, at the instance of John C., who wished his niece to remain in the house and take care of her infirm mother. John C. died 2nd September, 1874, having devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year later, and the defendant and his wife continued in possession. In 1875 one G. went to the house with the plaintiff's husband, with the view of renting it, when defendant shewed them over the house and said if it was going to be rented he would rent it himself and pay as much for it as any one, and he spoke of buying it.

The plaintiff having brought this ejectment in March, 1879, *Held*, that plaintiff was entitled to recover as against defendant, who set up the Statute of Limitations.

Per HAGARTY, C.J.—The defendant was never tenant to John C. during the lifetime of James C. and his widow; and the statute did not begin to run in his favour till a year after the death of the latter.

Per ARMOUR, J.—The entry of the defendant in 1867 by John C.'s authority determined the tenancy at will of James C., theretofore existing, and a new tenancy at will by defendant and James C. thereupon began, which was determined by the death of James C.'s widow, when defendant became tenant at sufferance to the plaintiff, and her entry, by her husband, with G., acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and stop the running of the statute.

EJECTMENT for a village lot in the village of Streetsville.
Defence for the whole.

The action was commenced on March 20th, 1879.

The plaintiff, by her notice of title, claimed title as devisee of John Crumbie.

The defendant by his notice, besides denying the plaintiff's title, asserted title and right of possession to the said land on the ground, that he had held possession thereof uninterruptedly for the space of ten years and over adversely to the said plaintiff, and those through whom she claimed title to the said land.

The cause was tried at the last Fall Assizes, at Brampton, by Patterson, J. A., without a jury.

It appeared that the plaintiff's devisor, John Crumbie, became the owner in fee of the property in question on the 12th of May, 1854. The property was composed of half an acre of ground, with dwelling house, out-buildings, and orchard thereon.

Some time afterwards, but when did not clearly appear, the devisor put his brother, James Crumbie, who was a man advanced in years, in straitened circumstances, and largely dependent on his bounty for support, into possession of the premises, on the understanding that he was to live there rent free.

Some time in the month of June, 1867, the defendant married a daughter of James Crumbie, and went to live on the premises with James Crumbie under the following circumstances, as detailed by Henry Scully, a witness called for the defendant: "I am married to Mrs. Hamilton's sister. I mind the time of John Hamilton's (defendant's) marriage. He was living at the time across the road at his father's. After his marriage he changed his place of residence. He went to live with James Crumbie after he was married. He went to live there with the doctor's (the devisor's) permission. I know this, because the doctor told me to tell him so. This conversation I had with the doctor would not be more than three or four weeks after they were married. I was down on a visit to the doctor's when it took place. I had been married to the other sister before that time. The circumstances were simply these: Mrs. Hamilton said she was going away, and I knew if she

went away he would have to hire a girl to mind the old lady, and I knew a girl could not do very well with her. I said, 'Doctor, supposing Mrs. Hamilton goes away, how will we manage?' Says he, 'Mrs. Hamilton must not go away. You go down and tell Hamilton he is to go and live in that house along with his wife, and tell the old folks I said so.' He said they were to occupy the best part of the house, as they had the best right to if they took care of them. This conversation was said in his own garden. That was all that passed between us. After that conversation I went down and told it to the four parties, John Hamilton and his wife and James Crumbie and his wife. John Hamilton was at the house at the time I told it. These four were present at the house when I told it. In delivering the message I told Mr. Hamilton Dr. Crumbie said he was to live in that house. Dr. Crumbie told me Mr. and Mrs. Hamilton were to occupy the parlor, and I told that to the four who were present. I delivered the whole of the message to them as near as I could. James Crumbie said it was all right; the old lady said nothing."

The devisor, John Crumbie, died on the 2nd of September, 1874, and by his last will, dated February 24th, 1865, devised the premises in question to the plaintiff.

It did not appear very clearly when James Crumbie died, one witness testifying that he died in 1873, and another in 1874, but both agreeing that his wife lived about a year after.

Robert Grimshaw, a witness called in reply by the plaintiff, deposed as follows: "I know Mr. Hamilton. I know the plaintiff. I have had no conversation with Mr. Hamilton with regard to the property mentioned here. I went to the place with Mr. Cooper, the husband of the plaintiff. I went to Mr. Hamilton with the intention of renting it. Mr. Cooper and I went together. It was in 1875 we went. I saw Mr. Hamilton at the house. The three of us were present. I think Mrs. Hamilton was also present. We went into the house. This was not a great while after James Crumbie's death. It might be a year or six months.

The circumstances that passed were these : Mr. Cooper told the business we were on—that he was going to rent it, and that I had come to see it for that purpose. Hamilton told him if he was going to rent it that he would rent it himself, and pay as much rent as any one else, and that he would like to buy it. That is about all that passed. I didn't rent the place. I didn't see Mrs. Cooper before going there. The reason I did not go on with the bargain was, that Cooper and he had some talk about buying the place. I think they didn't come to terms."

James Cooper, also called as a witness in reply, deposed as follows : "I am the husband of the plaintiff. I heard the evidence of the last witness (Robert Grimshaw). I remember the occasion he speaks of. Grimshaw was wishing to rent a house, and we went to look at this one. We went together from his shop. I rapped at the door, and Mr. Hamilton came. I told him I had a desire to rent the house, and that I had come to see it, to see what shape it was in. He said if I wanted to rent the house he would rent it, and pay me as much rent as any one else. Then he took us all over the house, cellar and garret, and we went out to the barn and looked at it, and the woodshed, and as we were leaving he spoke about buying it, if I would sell it. I said something, that I would see about it, but no bargain was ever made. This must have been five years ago last April or May. It was after the death of Mrs. James Crumbie. I was acting for my wife. I had spoken to her about Grimshaw wishing to get the house. At that time Hamilton was not claiming to be the owner of the house."

The learned Judge gave the following judgment :

"I am satisfied in this case that the proper conclusion from the evidence is that the defendant, from the way in which he had the possession and occupied the house, had no possession as separate from James Crumbie, or from James Crumbie's widow, as long as either of them lived in possession. All he can claim as possession in himself, I take it, would be from the death of the widow in 1875. A very satisfactory test of that would be to consider

this: supposing James Crumbie had lived for over ten years, until after the year 1877, and a question had arisen between the defendant and James Crumbie, could the defendant have set up as against James Crumbie that he had obtained title by possession? I think it is perfectly clear he could not. The tenancy, I have no doubt, must be held, on the evidence, to have continued in James Crumbie, the occupation the defendant had being simply to live there for the purpose of his wife's taking care of her mother, and being no more in possession of the place than any lodger is in possession of the house in which he occupies rooms. Then there would be no title acquired by the defendant by reason of his possession, as that possession began to date from 1875. If he has any right to maintain possession it must be because the statute had begun to run against the plaintiff, or rather against the testator, while James Crumbie was there as a tenant, and either from the year he first went in in 1867, or from the year after the first of July, 1867, as what took place then might be argued to be the determination of one tenancy and the constitution of another. I am perfectly satisfied on the evidence with respect to the character of the tenancy between James Crumbie and the doctor. My impression is, that the ten years after the first of July, 1868, would have operated in favour of James Crumbie to oust the title from the doctor. I think the evidence, as far as it deals with the character of the occupation, shews that the whole half acre was in the occupation of James Crumbie, and that that interference on the part of the doctor had no operation. The evidence with respect to repairs refers to an earlier date. If the statute were running in favour of James, and were continuing after the death of James's widow in favour of this defendant, then I don't think the interview Mr. Cooper had would amount to anything which would stop its operation; in fact it is not contended that it would. I think what I should do at present would be to enter a verdict for the plaintiff, because the title, no doubt, set up by the defendant is a title which asserts possession in himself, and trying the case as I am without a jury, the defendant will have an opportunity of availing himself of the position which I do not give effect to in his favour now. Verdict for plaintiff."

November 18, 1880. *C. Robinson*, Q.C., obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict

should not be set aside and a verdict entered for the defendant, pursuant to the Common Law Procedure Act, on the grounds that the evidence shewed that the defendant had acquired a title to the lands in question by length of possession: that the plaintiff had lost title to the said lands by reason of the adverse possession of the defendant and others, and that no notice to quit was given to the defendant by the plaintiff before action brought; or why a new trial should not be granted, on the ground that the said verdict was contrary to law and evidence; and why, if necessary, the defendant's notice of title should not be amended by alleging that the defendant John Hamilton, and one James Crumbie and others had held possession of the lands and premises uninterruptedly for ten years.

December 8, 1880. *Ferguson*, Q. C., shewed cause. The defendant was not ten years in possession on his own shewing. The plaintiff's paper title was complete. Counsel for defendant did not shew, nor seek to do so, anything whereby he could add to the defendant's possession the possession of James Crumbie, so as to bring himself within the cases. If he had, the plaintiff would have given further evidence shewing the connection between Dr. and James Crumbie, and that James Crumbie was not so in possession as to have that possession reckoned against Dr. Crumbie.

Robinson, Q. C., contra. Apart from the alleged entry, defendant shewed a title by possession. The plaintiff had been out of possession for ten years, and others in possession without any acknowledgment of title, and this is sufficient: *Lloyd v. Henderson*, 25 C. P. 253. As to the entry, *Canada Co. v. Douglas*, 27 C. P. 346, is distinguishable. There there was a written acknowledgment when the entry was made. An entry, to be sufficient, must be accompanied by an actual assumption of possession: *Banning* on Statute of Limitations, 103, and cases cited. See *Doe Perry v. Henderson*, 3 U. C. R. 486. See also *Allen v. England*, 3 F. & F. 49. See *Robinson & Joseph's* Digest, 2127; *Williams v. McDonald*, 33 U. C. R. 423; *Ketchum v. Mighton*, 14 U. C. R. 99. On the question of joint possession, see *Foley v. Foley*, 26 Grant 463.

February 12, 1881. ARMOUR, J.—When James Crumbie was put into possession of the premises by his brother John Crumbie, the plaintiff's devisor, to live there rent free he thereby became a tenant at will thereof to John Crumbie.

This tenancy at will was, in my opinion, determined by John Crumbie in July, 1867, by what then took place.

It is plain from the evidence that at that time, however willing James Crumbie might have been to have the defendant come and live in the house with him, and there is no evidence that he was willing, his wife was very unwilling, and that it required the authority and command of John Crumbie to bring it about. "You go down," he said to Henry Scully, "and tell Hamilton he is to go and live in that house along with his wife, and tell the old folks I said so."

This message was delivered, James Crumbie and the defendant being both present. James Crumbie assented to its being complied with, and the defendant went into possession of the premises, occupying a portion of the house separate from that occupied by James Crumbie, and the residue of the premises in common with James Crumbie.

The result of this arrangement was, in my opinion, to create a new tenancy at will, both James Crumbie and the defendant thereby becoming such tenants.

This tenancy at will continued until it was determined in 1874 by the death of John Crumbie.

Thereafter, and until the occasion referred to by Grimshaw and Cooper in their evidence, the defendant continued in possession of the premises as a tenant at sufferance only.

I think that the entry on that occasion, made upon the premises by the plaintiff, through the agency of her husband, in her character as owner of the fee, and in the avowed assertion of her right and power to deal with the possession of the premises by leasing them, this her character and her right and power so asserted being then fully recognized and acquiesced in by the defendant, was a sufficient entry to stop the running of the statute.

Be this as it may, however, I think that this entry and what then and thereupon took place constituted the defendant a tenant at will to the plaintiff, and thus a new tenancy was thereby created.

The result is, therefore, that the defendant has not made out a title to the premises by possession, nor has the right and title thereto of the plaintiff been extinguished.

The rule will therefore be discharged.

HAGARTY, C. J.—I am not prepared to differ from the learned Judge who tried this case, in his finding on the facts as to the character of defendant's occupation.

He considers, as I understand, James Crumbie to have been the tenant of Dr. John Crumbie, and that when defendant and his wife went to live there in 1867, it was not so that he became the doctor's tenant, but that they went to live there in a subordinate character, the main object being that his wife should continue to assist her mother, the invalid wife of James, the actual tenant.

It was a family arrangement, and I attach little importance to the question whether James or his wife, or either, liked or disliked the arrangement; nor do I consider it important to consider the parts of the house respectively occupied by the parties.

The arrangement was made by [the true owner not to accept defendant as a tenant, or to become his landlord, but solely to assist the actual tenant.

I think defendant, during James Crumbie's life, never either professed to be tenant, or to have any interest in the property, or was ever considered by the owner or by James Crumbie to be tenant, or to have any interest.

The owner died in 1874. Nothing up to that time had occurred to bar his right. James had died during the preceding year. The wife of James died in about another year. Defendant's wife lived with and took care of her invalid mother in this house. He married her privately. When he was asked, "Was there any reason for your going to live with the old people?" He answers: "My wife could

not leave her mother, because she was an invalid at the time. It was in this way the marriage was disclosed to the old people, and I went to live there."

It was clear that the doctor chiefly supported James, his brother. Defendant says: "We partook at the same table for some time. I brought things (provisions) into the house. We had not any furniture to bring into the house. * * I bought some trifling things when we went to live there." He cannot say how long they continued eating at the same table, but in consequence of a rumour that they were eating things furnished by the doctor, he took himself away from the table. "My wife had still to wait on her father and mother at the table." Can't say whether it was a year or two after going into the place that he left the table, nor how long he had a table of his own. "Very frequently, however, we used all to partake at the same table." "We always lived in the same house, and lived amongst one another."

Dr. Woods' evidence shews how they lived. "Hamilton and his wife occupied a small room and the kitchen, and Mr. Crumbie and his wife occupied the front part of the house." He says that when defendant's child was sick he (the doctor), asked James Crumbie to let them have another room in the house to keep the sick child in. Mrs. Crumbie refused. He said James and wife lived chiefly on the bounty of the doctor.

I think a jury would properly find on the evidence that defendant was never tenant or occupant of this house during the lifetime of James Crumbie down to 1873, or of his widow to 1874; that he and his wife were merely there in a subordinate position, allowed to live in part of the house to continue the help and attendance which defendant's wife had up to her marriage given to her mother.

I am unable, therefore, to see that defendant has made out his defence under the statute. I incline to think that the statute would not begin to run in his favour till a year after the death of Mrs. James Crumbie, say about 1875 or 1876.

A lady occupying a house by the owner's permission, rent free, might have a very valuable sick nurse. She discovers that the latter has married secretly. To avoid losing her service she consents to the husband coming to live and occupy a couple of rooms in the house with his wife. It could hardly be contended that the man could set up the statute against the true owner during the lady's life, even though it was by the owner's consent or advice that he had been allowed to live there.

On the other branch of the case, as to Cooper's entry in 1875, I cannot distinguish this case in principle from the decision in *Doe Shepherd v. Bayley*, 10 U. C. R. 310.

There the owner visited the land, told defendant that he had come to take possession, to which defendant made no objection. Plaintiff planted a small tree, telling defendant he did this as an act of taking possession, and that he was going to sell the land to R., who accompanied him. They remained more than an hour on the lot. R. did not buy.

Two years afterwards he went again, an intending purchaser going with him. They found defendant on the adjoining lot on which he lived. The plaintiff on the lot offered to sell the lot to him. The defendant argued with the plaintiff as to price, and promised to come to Toronto in the autumn and pay. The plaintiff returned home, but the defendant never came to complete the bargain. The plaintiff did nothing for over fifteen years afterwards.

The jury were asked, did the plaintiff in 1830 and 1832 (the dates of the visits) make actual entry with a view to take possession? The jury, however, found for the defendant, though they answered this question in the affirmative. A new trial was granted.

Sir J. Robinson fully reviews the case, and says, if the jury believed that the defendant in 1832 agreed to purchase, that would constitute a new tenancy at will, after the first had been determined: "The entry was, in my opinion, a sufficient entry to determine the will, notwithstanding anything in the 22nd section of the statute."

In our case the owner, through her husband and agent,

enters on the premises with an intending tenant, states his purpose to the defendant, who makes no objection, and proceeds to view the state of repair. The defendant then says, if he is going to rent it he would rent it himself, and pay as much rent as any one. As they were leaving the defendant spoke about buying it if the plaintiff would sell it. The plaintiff's husband said he would see about it, but no bargain was made.

This was an entry under a clear claim of right, professing to treat the property as belonging to the plaintiff, and asserting her right to deal with it.

The defendant, so far from making any pretence of claim, at once submits, and offers to pay rent, as much as any other would give, or to buy.

Such an entry of the plaintiff, if not made in right, would have been a trespass on defendant's possession.

I cannot regard this as a mere entry, such as our statute declares to be insufficient, and as is spoken of by Lord Campbell in *Randall v. Stevens*, 2 El. & Bl. 641, 652, "*a mere entry*, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt, or intention, or wish to take possession." This case is noticed in *Canada Company v. Douglas*, 27 C. P. 346.

We may assume, then, that the defendant had been in possession for some years with Dr. Crumbie's leave, or on his sufferance, paying no rent. On his death, his devisee enters with an intending tenant, openly asserting her right and expressing her intention of exercising ownership by putting in another tenant, and views and examines the state of repair, as owner.

The defendant submits to all this, and offers to become tenant at as high a rent as another would give, or to become a purchaser.

If this be not a good entry to break the running of the statute, it would at least, I think, be a determinancy of any pre-existing tenancy at will, or on sufferance, and be good

ground for a jury to find the creation of a new or fresh tenancy.

Up to that time, or say Dr. Crumbie's death, the defendant might urge that no rent was payable. After this entry and this conversation, if plaintiff suffered him to remain on undisturbed, could she not recover for use and occupation on the evidence of his expressed readiness to pay as much rent as another would pay?

I think the facts here proved will satisfy the test as to a determination and fresh departure, laid down by the Privy Council in *Day v. Day*, L. R. 3 P. C, 751.

This case is fully discussed in *Keffer v. Keffer*, 27 C. P. 257, where there is a very clear review of all the authorities in the elaborate judgment of Gwynne, J.

I think we may prevent a great injustice, without violating any established rule of law, by upholding the plaintiff's verdict.

CAMERON, J., concurred.

· *Rule discharged.*

CLARKE V. CREIGHTON ET AL.

Married women—Liability on contract—Separate estate—35 Vic. c. 16, O.

In an action on a promissory note made by the defendant G., a *feme covert*, married after 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay certain insurances on the trust estate, it appeared that the testator had devised his real estate to his trustees in trust to sell as one B. should deem expedient, and out of the proceeds to pay debts and invest the residue, and to expend the income in the maintenance of the trustee and his other children until the youngest should attain the age of twenty-one, and then equally to divide amongst all the children, the issue of deceased children to represent their parent: *Held*, that until the youngest came of age, C. had no separate estate available in execution, and that she was not liable on the note, ARMOUR J., dissenting, and holding that the true construction of the Married Women's Property Act is impliedly to enable a *feme covert* to incur debts, to make engagements, and to enter into contracts as if she were a *feme sole*, and that the remedy in respect of any such debts, &c., should be against her personally, and should not depend upon the fact of her ever having had separate estate or not.

DECLARATION on a promissory note, made by the defendants, J. Creighton and M. E. Gordon, dated the 25th of November, 1879, payable three months after date to the order of the plaintiff, for \$400.

Pleas. 1. By both defendants: That they did not make.

2. By both defendants: Want of stamps.

3. By the defendant M. E. Gordon: Coverture.

Replications. 1. Joinder of issue.

2. To third plea: That the defendant M. E. Gordon was married after March 2, 1872, and was at the time of the making of the note possessed of separate real and personal property, owned at the time of and prior to her marriage: that such real and personal property was not affected by the trusts of any settlement: that her husband had no legal or equitable interest therein: that the making of the note was the separate contract of the defendant M. E. Gordon, and made by her respecting her separate estate, and the same was received and accepted by the plaintiff on the faith and credit of such separate estate, and the said M. E. Gordon was in possession and still continued to be the owner of the said separate estate.

Issue.

The cause was tried at the last June Assizes, at Toronto, by Armour, J., without a jury.

The note was put in and proved. The probate of the will of William Creighton, and the examination of the defendant M. E. Gordon, were also put in and proved.

The note was as follows:—

“\$400. TORONTO, 25th November, 1879.

“Three months after date we promise to pay to the order of S. R. Clarke, at the Imperial Bank here, four hundred dollars. Value received.

“J. CREIGHTON, } Trustees Estate Creighton.”
“M. E. GORDON, }

The separate estate alleged to belong to the defendant M. E. Gordon came to her by the will of her father, William Creighton, who died November 11th, 1872. By it he devised and bequeathed as follows:—

“I appoint my son John Creighton sole executor and trustee of this my will, and I direct my said executor to consult with and act under the advice and direction of William Henry Beatty, of Toronto, respecting all his dealings with my estate.

“I devise and bequeath to my said executors all the real and personal property, of whatever kind and wheresoever situate, which I may die possessed of or entitled to, upon trust to sell and dispose thereof, or such portions thereof, from time to time, as the said William Henry Beatty may think advisable, and for such prices and on such terms as to credit and otherwise as the said Beatty may deem expedient, and out of the proceeds thereof to pay my just debts, funeral and testamentary expenses, and the expenses of administering my estate and carrying out the trusts of this my will; and to invest the residue of such proceeds, and such other moneys other than income as may come into his hands, in such reasonably secure investments as the said Beatty may think fit and likely to produce a fair annual income, and such investments to change from time to time with the consent of the said Beatty, and to pay and expend the income of my estate in the maintenance and education of himself and my other children, until the youngest surviving child shall attain the age of twenty-one years, excepting that if any of my children that may or shall, without the consent of the said Beatty, cease to reside

with the others, he or she shall not be maintained out of said income, but the same shall be applied in the maintenance and education of the others, as above provided. Upon my youngest surviving child attaining the age of twenty-one years, the whole of my estate to be equally divided among my children, including my said executor, share and share alike, the lawful issue of any of my children who may have died to receive the share of the deceased parent.

* * And further, it is my will that upon my daughter Mina attaining the age of twenty-one years she shall become and be a trustee of this my will, together with my son John."

By the examination of the defendant M. E. Gordon, put in at the trial, it appeared that she was married on October 15th, 1878: that there was no marriage settlement: that she and her co-defendant were trustees under her father's will, and that the money, the proceeds of the note sued on, was obtained to pay insurance on the trust property: that at the time of her marriage she had no separate estate: that she had previously assigned anything coming to her under the will to Mr. Beatty as a security for a loan of \$300, but that if there was anything over after paying him, she was to get it back, but that there would not be, as she had spent it before that: that she did not know the value of her interest in her father's estate: that the children lived separately from her; and that she had no property except under her father's will.

The learned Judge, thinking the verdict ought to be for the plaintiff, so entered it for \$408.31, with leave to the defendants to move to enter a nonsuit or a verdict for the defendant Gordon, and with leave to the plaintiff to move to strike out the name of the defendant Gordon on such terms as the Court might think proper.

In Trinity Term last *W. N. Miller* obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit for one or both of the defendants, or to enter a verdict for the defendant Gordon, pursuant to leave reserved at the trial, on the grounds, among others, that the defendant Gordon was a married woman at the time of the making of the note sued

on, and that there was no evidence to shew any liability on her part on the note.

November 25, 1880. *J. K. Kerr*, Q. C., shewed cause. The addition of the words, after the signatures of the defendants, "Trustees of the estate of Creighton," should not be looked at, as they were simply surplusage. The defendant Gordon is possessed of separate property under the will of her father, and the effect of that will is to vest the property in her. When she gave the note she contracted with reference to her separate estate. The judgment should therefore be as indicated in *Lawson v. Laidlaw*, 3 App. R. 77. But it is not material whether Mrs. Gordon had separate estate, for under the Married Women's Property Act, 1872 (35 Vic. ch. 16), "Any married woman shall be liable on any contract made by her." *Pike v. Fitzgibbon*. L. R. 14 Ch. D. 887, *Flower v. Buller*, L. R. 15 Ch. D. 665, decided upon the English Act, are authorities shewing how our Act should be interpreted.

W. Miller, contra. The defendant Gordon had no separate property out of which the plaintiff's claim could be collected. *Darling v. Rice*, 1 App. R. 43; *Lawson v. Laidlaw*, 3 App. R. 77. *Pike v. Fitzgibbon*, 28 W. R. 667; and *Flower v. Bullen*, 28 W. R. 948, are at variance with our own decisions, and our Court of Appeal should be followed. The evidence put in shewed she had no estate other than that bequeathed to her by her father. She was married in 1878. Under the will, on her marriage her right to maintenance ceased. Besides the right to be maintained, she had no estate. At most, she had an estate which would become vested in her on the youngest child of William Creighton becoming of age; this estate was not vested: See *In re Goodhue*, 19 Grant 406, 438, 451; *Williams on Executors*, 8th ed., pp. 1230, 1242. Even if the estate did vest, it was subject to be divested on Mrs. Gordon dying before the youngest child attained twenty-one years, and in no case is it such an estate as equity would give execution against: *Fisken v. Brooke*, 4 App. R. 8; *Field v. McArthur*, 27 C. P. 15. Even assuming

Mrs. Gordon had an estate, the evidence shews she did not contract with reference to it. Now the note is signed by the defendants as trustees of Mr. Creighton's estate, and the plaintiff declares against the defendants as trustees. The parties evidently thought they were binding the estate of Mr. Creighton. No doubt, when a married woman who has separate estate contracts, she is presumed to contract with reference to it; but here the presumption is rebutted. Again, Mrs. Gordon, even if she had any separate estate, disposed of it, and she had none when the contract was made. Even if Mrs. Gordon had separate estate, what kind of judgment can the Court give? They cannot give a joint one, as Mrs. Gordon's liability depends on her separate estate, and Creighton's liability is personal. Assuming Mrs. Gordon is not liable, what is Creighton's position? He entered into a joint contract. The contract is joint, and the consideration for it is joint. If Mrs. Gordon is relieved, Creighton ought to be also: *Chitty on Contracts*, 146; *Chandler v. Parks*, 3 Esp. 76; *Jaffray v. Frebain*, 5 Esp. 47; *Boyle v. Webster*, 17 Q. B. 950.

February 12, 1881. ARMOUR, J.—The avowed object of the Legislature in passing an Act, as made known to the public by the discussion that takes place upon the bill in its passage through the Legislative Assembly, and the intention of the Legislature in passing the same Act, as extracted by the judicial process, are often widely different.

The Married Woman's Property Act, 1872, affords two illustrations of this difference.

The avowed object of the Legislature in providing in the first section that "any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*," was not to give to a married woman the power to contract for the disposal of her real estate or to make her liable on any such contract. That object was distinctly disavowed; but the object was to make a married woman liable on any contract made by her for the improve-

ment, reparation or the like of her real estate, and this object was distinctly avowed, and it was expressly declared that the object was to meet cases of similar circumstances to *Wright v. Garden et ux.*, 28 U. C. R. 609.

The intention of the Legislature in thus providing was, however, as extracted by the judicial process, determined in the Court of Chancery to be to give to a married woman the power to contract for the disposal of her real estate, and to make her liable on any such contract.

And this was so determined, notwithstanding the presence on the Statute book of the Consol. Stat. of U. C. ch. 85, and 34 Vic. ch. 24, O., and notwithstanding the subsequent passing of the Act 36 Vic. ch. 18, O. See the judgment of Blake, V. C., in *Adams v. Loomis*, 22 Gr. 99; the judgment of Proudfoot, V. C., in *Boustead v. Whitmore et ux.*, 22 Gr. 222, and the judgment of Proudfoot, V. C., on the rehearing of *Adams v. Loomis*, 24 Gr. 242. Spragge, C., in the latter case, expressly refrained from expressing an opinion on the construction of the Married Women's Property Act, 1872.

Paterson, J.A., however, treats the question as still an open one, notwithstanding the above judgments of the Vice-Chancellors, and in *Standard Bank v. Boulton*, 3 App. R. 93, says: "It may yet have to be decided to what class of contracts the provision of the section applies. Does it include contracts to sell or charge the land, or only those relating to its use and enjoyment? If contracts to sell are included, how are they to be enforced? How is the remedy by decree for specific performance affected by the law which requires the husband to join in the conveyance?"

Proudfoot, V.C., however, answered this latter question by anticipation in *Boustead v. Whitmore*, 22 Gr. 229, where he says: "I am inclined to go further, and to think that if it were necessary the husband should join, the statute having given her the power to contract, she could apply to the Court to compel him to execute the deed."

So also the avowed object of the Legislature in providing in section 9, that "any married woman may be sued

or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried," was to make the liability of a married woman for her separate debts, engagements, contracts, and torts, the same as that of a single woman, for her debts, engagements, contracts, and torts.

The judicial process, however, speedily determined that such was not the intention of the Legislature, but what the exact intention was, it has not yet successfully extracted.

The intention was, according to Gwynne, J., in *Merrick v. Sherwood*, 22 C. P. 480, "to enable her to be sued at law as if she were *sole*, in respect of a debt, whereas before the Act she could only have been sued in equity; and with respect to her torts to be sued alone, whereas before the Act she could only have been sued jointly with her husband."

This Court followed *Merrick v. Sherwood*, in *Steels v. Hullman*, 33 U. C. R. 471, and Richards, C. J., in giving judgment, said: "It is true that there may be in law a further procedure *against her person*, which could not be had in equity on a debt contracted against her individual property."

In *McCready v. Higgins*, 24 C. P. 233, Gwynne, J., in referring to what was decided in *McGuire v. McGuire*, 23 C. P. 123, says, (although it does not appear in the report of *McGuire v. McGuire*,) "and as to the remedies given against her, we decided that the separate debts, engagements, and contracts referred to in the ninth section, were those debts, engagements, and contracts which, in view of their having been entered into upon the faith and credit of separate estate, the Courts of Equity attached upon and satisfied out of such separate estate; and we held that the operation of the ninth section, of 35 Vic., ch. 16, so far as concerned remedies against the separate contracts, debts, and engagements of the wife, was simply to give a remedy at law to her creditor in addition to the remedy he

already had in equity. We did not hold that a married woman had incurred a liability at law in any case wherein the liability in equity did not exist at the time of the passing of the Act. We are not warranted in holding that she is entitled to contract so as to bind herself in any manner not specially declared by the Act."

In *Wagner v. Jefferson*, 37 U. C. R. 551, the majority of this Court followed *McCready v. Higgins*, but Wilson, J., dissented from the views therein expressed. He says, p. 577: "So the ninth section seems to make the married woman answerable whether she has a separate estate or not. She is to be liable not only for her contracts, but for her torts, 'as if she were unmarried.' * * I am of opinion the liability of the married woman to suit for torts, and, as it appears to follow as a consequence, on her contracts also, is of a personal nature, not depending upon her possession of a separate estate: that the proceeding against her is not to be considered as under the former law in the nature of a proceeding in *rem*, but as an ordinary suit against a person who is competent to contract and be contracted with."

In *Field v. McArthur*, 27 C. P. 18, Gwynne, J., again states at some length the views expressed by him in the cases above cited, and says: "The Act does not, as it appears to me, contemplate that a married woman can contract as a *feme sole* except in respect of and in right of some separate property which she has to her own use. Nor does it contemplate relieving the husband of a married woman having no such separate property from all liability, and subjecting her alone to an action in respect of a contract made by her as his agent, or for a tort committed by her." He then proceeds to suggest the form of the judgment that should be pronounced against the separate property.

In *Darling v. Rice*, a County Court appeal, 1 App. R. 43, Draper, C. J., says: "The effect of the concluding portion of the 9th section I take to be, that a married woman may be sued separately from her husband, as if she were unmarried, for her separate debts, contracts, and engagements in a

suit at law, as if she were sole; whereas before she was only liable in equity, and in respect to a tort could only have been sued jointly with her husband. It is the procedure which is altered; the principle on which her liability rests is unaffected. That principle I take to be, that to be liable for separate debts, contracts, and engagements, the married woman must be shewn to have separate estate, especially where, as in this case, she is not living apart from her husband. * * I think that to maintain any such suit as the present against a married woman, she must first of all make a contract or engagement or incur a debt; next, that the liability, to enforce which she is sued or proceeded against, must either have arisen in respect of some employment or business in which she was engaged in her own behalf; or, thirdly, that she was possessed of separate estate."

Burton, J.A., says: "It never could have been intended under that Act to remove all the disabilities of a married woman, and enable her to enter into any description of contract as freely as a *feme sole*, or the end might have been attained in one short enactment."

Patterson, J.A., says: "If we were to hold her liable on this contract, we should in effect decide that there is no difference between the capacity of a married woman and that of a *feme sole* in respect of making contracts and liability upon them. It is impossible to hold that this result is to be deduced from a statute which could have so enacted, if such was the intention, in a very few words."

Moss, J.A., says: "I think the object of this provision was to render it unnecessary any longer to join her husband as a defendant when a suit was brought upon any separate engagement or contract binding upon her. In my opinion, it should not be construed as extending her power to contract, but as defining the procedure which may be adopted when a suit or proceeding is conducted against her on a contract or engagement on which she is liable. It did not make her liable upon every contract or engagement which she made apart from her husband, but shut

the door against the objection that her husband should be a party when she or her property was sought to be made liable upon a contract or engagement which by any statute or equitable doctrine she was empowered validly to make."

In *Kerr v. Stripp*, 24 Grant 198, Proudfoot, V. C., says: "I do not think the Act of 1872 has enlarged the liabilities of married women beyond what they were before in regard to her separate estate: that she is only liable now in regard to her separate estate, and that a personal order against her must be refused."

I understand Blake, V. C., to be of a different opinion, from the fact that he made a personal order against the defendant in *Standard Bank v. Boulton*.

In *Lawson v. Laidlaw*, 3 App. R. 77, another County Court appeal, Patterson, J. A., who delivered the judgment of the Court, says, p. 88, the Act of 1872 "stopped short of enabling her to contract in all cases as a *feme sole*, as we had occasion to point out in *Darling v. Rice*, 1 App. R. 43;" * * and at p. 91: "As to the judgment, I agree with Gwynne, J., in the suggestion made in *Field v. McArthur*, 27 C. P. 15, that it should be a decree charging the separate estate." He then proceeds to draft a form of judgment, and adds: "The question of execution may perhaps occasion embarrassment, but so it often does when the defendant is *sui juris*."

In *Consolidated Bank v. Henderson*, 29 C. P. 549, Wilson, C. J., again argues at some length for the view expressed by him in *Wagner v. Jefferson*, as to the effect of the concluding part of the 9th section, and says, p. 554: "It was intended that she should be personally liable upon all her own separate contracts, and for all her own separate torts, and the statute, in my opinion, says so."

In *Carroll v. Fitzgerald*, 5 App. R. 322, it was held that notwithstanding section nine, a married woman is still entitled under 21 James I., ch. 16, to bring an action in respect of her separate property within six years after becoming discovert.

In *Amer v. Rogers et ux*, 31 C. P. 195, my brother Osler held, in single Court, that in an action for a tort committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone ; and that too, as I understand the case, whether the wife has separate estate or not.

In *McFarlane v. Murphy*, 21 Gr. 80, the Chancellor held, that in a bill to set aside, as fraudulent against creditors, a mortgage made to a married woman, her husband was neither a necessary nor a proper party.

The decisions in the Court of Appeal to which I have adverted shed no light on the question that had not already been shed upon it by Gwynne, J., in the decisions above referred to. They are simply an adoption of his views.

The process by which these views were arrived at, closely pursued, and indeed outran the canon laid down in *Kraemer v. Glass*, for the construction of the Married Women's Property Act, 1859, to the effect that the most narrow and restricted construction should be put upon its provisions.

This process having been applied to the concluding part of the ninth section, produced this—that when the Legislature there said that any married woman might be sued or proceeded against, it did not intend that any married woman might be sued or proceeded against, but only that any married woman who had separate estate, and that separate estate only of a particular quality, might be sued or proceeded against; nor did it intend that any married woman so having such separate estate of such a particular quality might be sued or proceeded against, but only that such separate estate of such a particular quality might be proceeded against; and that when the Legislature there used the words “as if she were unmarried,” it did not intend to use those words, and that the section should be read as if they were struck out.

Procedure, said Gwynne, J., was all that was aimed at by the Legislature in the clause in question, and it was enacted simply to give a remedy at law to the creditor of

a married woman in addition to the remedy he already had in equity.

It is true that at law there was no appropriate procedure that could be used against the separate estate of a married woman to make it available for the payment of her debts, contracted in reference to it; but this was but a trifling obstacle, and was easily surmounted by inventing a procedure, the outlines of which we have in *Field v. McArthur*, brought to perfection in *Lawson v. Laidlaw*.

It is true also that this procedure, so invented, will in nine cases out of ten fail in its purpose and prove defective; but this is no objection to it, for the creditor having exhausted its usefulness can afterwards go into equity for that relief which he could have obtained in equity by going there at first. This is pointed out in *Merrick v. Sherwood*, and in *Lawson v. Laidlaw*.

Having regard to the fact that at the time of the enacting the clause in question the Court of Equity had an appropriate procedure for making the separate estate of a married woman available for the payment of her debts contracted in reference to it, and that the Courts of Law had none: that the Court of Equity was possessed of powers of which the Courts of Law were not, *e. g.*, of registering a *lis pendens*, of issuing injunction, of appointing a receiver, of discovery, of preventing alienation, of adding parties, of taking accounts, and of issuing equitable execution,—I cannot think it possible that the whole power of the Legislature was exerted in enacting this clause merely to give to the creditor of a married woman the *donum damnosum* of an utterly inappropriate and ineffectual remedy at law against her separate estate.

The mode which has been adopted for obtaining the remedy at law in a case like the present is at least artistic. The plaintiff commences in his declaration by claiming from the defendant damages for the nonpayment of the note. The defendant pleads her coverture. The plaintiff replies that she had separate estate (not specifying it), and that she made the note in reference to it, upon which

issue is joined. The claim in the declaration against the defendant personally becomes in the replication a claim against her separate estate.

One would have thought that the claim made in the replication ought properly to have been made in the declaration, but the clause in question, according to the construction which has been put upon it, forbids this. See *Merrick v. Sherwood*, 22 C. P. 481, where a use has been found for the words, "as if she were unmarried."

The plaintiff, if successful in proving that the defendant has that particular quality of separate estate which is essential to his recovery, obtains judgment in the form prescribed in *Lawson v. Laidlaw*, that he do recover out of the separate property of the defendant, which was at the date of the note, and still is, vested in her, or in any other person in trust for her, the amount of the note and interest.

I do not know whether any unfortunate creditor of a married woman has ever got as far as execution, and as I am without a precedent, and as Patterson, J. A., says the question of execution may perhaps occasion embarrassment, I will not attempt to trace the mode farther.

The seventh resolution adopted by the Court of Appeal in *Lawson v. Laidlaw*, 3 App. R. p. 91, was, that "The property so made liable must be property with reference to which she may be supposed to have contracted, and therefore must be property to which she is entitled when the debt is incurred." And it is upon this resolution that the form of judgment above given was based.

This resolution still further proves how illusory the remedy at law would be, for the intelligent married woman would take care that the property with reference to which she might be supposed to have contracted, would not wait to be charged with a judgment, and in virtue of it she would probably be entitled to plead in bar of the action that she had parted with it, if she had done so before action, and by way of *puis darrien continuance*, if she had done so after action.

This resolution has, however, received a rude shock in the recent cases of *Pike v. Fitzgibbon*, L. R. 14 Chy. Div. 837, and *Flower v. Buller*, 15 Chy. Div. 665, which have gone very far towards removing, if they have not altogether removed, the foundation upon which the extraordinary construction put upon the clause in question was built.

The particular quality of the separate estate which a married woman must have to enable her creditors to proceed against it under the clause in question, has not yet been very accurately defined.

The logical result of the construction put upon the clause in question is, that a married woman cannot be proceeded against personally for her torts, but her separate estate only can be proceeded against. It is impossible, logically, to put upon the clause the construction that for her separate debts, engagements, and contracts, she cannot personally be proceeded against, but her separate estate only can be proceeded against, and to put a different construction upon the clause in respect of her torts. Therefore, inasmuch as to make her separate estate liable for her contracts, she must be taken to have contracted with reference to it, to make it liable for her torts she must be taken to have become a tortfeasor with reference to it; *e. g.*, if she slanders her neighbour, she must at the same time intend to charge her separate estate with the consequences.

Gwynne, J., bowed to this inevitable logic of the construction he had put upon the clause in question, and in *Field v. McArthur* held that under it a married woman could not be proceeded against personally for her torts, but that her separate estate only could be proceeded against.

My brother Osler, in *Amer v. Rogers*, came to the conclusion that the effect of the clause was to make a married woman and her alone, and whether she had separate estate or not, personally liable for her torts, and he could not well have arrived at this conclusion unless he had been of the opinion that the effect of the clause was to make a married woman, and her alone, and whether she had separate estate or not, personally liable for her separate debts, engagements and contracts.

The Legislature, in the Married Women's Property Act, 1872, kept up the distinction it had previously observed in the Act of 1859, Consol. Stat. U. C. ch. 73, between the real estate and the personal estate of married women, and in it continued to make separate provisions with respect to each. Accordingly, we find the Legislature, in the first section of the Act, where it is dealing with real estate only, providing that any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*; and in section 9, where it is not dealing with real estate, only providing in effect that any married woman shall be liable on her other contracts, and for her separate debts, engagements and torts, as if she were a *feme sole*. I say providing in effect, because I think that providing that any married woman may be sued or proceeded against in respect of any of her separate debts, engagements, contracts, or torts as if she were unmarried, is in effect providing that she shall be liable for them as if she were a *feme sole*. The words "separately from her husband," would stand, were the clause properly punctuated, between commas, the obvious reading of the clause being, any married woman may be sued, or proceeded against, *and that too* separately from her husband, in respect, &c., as if she were unmarried.

We therefore have the married woman made liable in the first section upon any contract made by her respecting her real estate as if she were a *feme sole*, and in section 9, upon any other contract, and for any of her separate debts, engagements, or torts, as if she were a *feme sole*. It is true that the Legislature, in both these sections, stopped short of, by express words, enabling her to contract, but I think it fair to infer that if it made her liable on her contracts, it impliedly gave her power to make the contracts upon which it made her liable.

What then is the remedy to be had against a married woman for the breach by her of a contract made by her respecting her real estate, and upon which the Legislature has declared in the first section that she shall be liable

as a *feme sole*? Is the remedy to be had against her personally, or must it be the adjudged remedy of the ninth section against her separate estate only? If against her personally, why should not the remedy for the breach of her contracts mentioned in the ninth section, be against her personally too? If, however, the remedy must be that of the ninth section against her separate estate only, it may turn out that her real estate, respecting which the contract was made, is not separate estate, and that she has no separate estate of that particular quality which will sustain the remedy of the ninth section. In such case will the person with whom she has made and broken her contract, be without remedy?

The advocates of the narrow construction are, however, equal to the emergency; they say that real estate in that clause of the first section does not mean real estate, but only such real estate as is separate estate of that particular quality that will sustain the remedy of the ninth section, and that a married woman is not made liable upon any contract made by her respecting any other. I then ask them, why then did the Legislature make that provision, for without it there was a remedy upon such a contract against a married woman already in equity? They answer at once, it was procedure merely that was aimed at; it was to give a remedy at law which, up to that time, had only existed in equity.

In the concluding part of the 8th section the Legislature enacted that a husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts. It did not enact in that section that the wife should be liable. Her liability for such debts and contracts must therefore depend upon the concluding part of the 9th section, thus furnishing proof that the Legislature in effect provided, in the concluding part of the 9th section, that a married woman should be liable for her separate debts, engagements, and contracts, as if she were a *feme sole*, and that she could incur, make, and enter into

debts, engagements, and contracts as if she were a *feme sole*.

In *Darling v. Rice*, Draper, C. J., saw this difficulty, and attempted to get over it by holding that the possession of separate estate by a married woman was not necessary to sustain the remedy under the 9th section, when the debt was incurred in respect of some employment or business in which she was engaged on her own behalf. This was in effect holding that the construction of the concluding part of the 9th section should shift according to the character of the separate debt sought to be recovered, and for such a holding I humbly submit there is no authority.

In my opinion, when the Legislature enacted in the first section that any married woman should be liable on any contract made by her respecting her real estate as if she were a *feme sole*, it impliedly enabled her to make any such contract as if she were a *feme sole*: that the words "real estate" should receive as liberal a construction as possible, and that the remedy for the breach of such a contract should be against her personally, and should not depend upon whether she ever had any separate estate or not. And although I have always thought, and still think, that contracts respecting her real estate, within the meaning of the clause, did not include contracts for the disposal of it, but only contracts for its improvement, reparation, and the like, I would much rather follow the wide construction of the Court of Chancery than have the narrow construction to which I have above referred thrust upon me.

In my opinion, when the Legislature enacted in the concluding part of the 9th section that any married woman might be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried, it in effect made her liable for her separate debts, engagements, contracts, and torts, as if she were a *feme sole*, and impliedly enabled her to incur debts, to make engagements, and to enter into contracts as if she were a *feme sole*; and that the remedy in respect of any such debts, engagements, contracts, or torts, should be against her personally, and

should not depend upon whether she ever had any separate estate or not.

It is gravely argued, however, that it is impossible that the Legislature could have so intended, or the end might have been attained in one short enactment. I think it much more reasonable to hold that the Legislature did so intend, than to hold that it was only giving to the creditor of a married woman the right to the same remedy at law that he had previously only in equity by enacting two clauses for that purpose, neither of which has the remotest reference to such an object.

These opinions are by no means original. They have been held and maintained by the present Chief Justice of the Common Pleas from the beginning, and it is no disparagement of any one to say that no Judge more learned in the law than he has ever pronounced a contrary opinion. The course and tendency of judicial decision in this country has been and is in favour of the married woman and against her creditors; in England it has been and is against the married woman and in favour of her creditors.

In the decisions in England upon the Married Women's Property Act of 1870, the object and effect of that Act are pronounced to be the establishment of the independent personal status of the married woman. The decisions in this country upon the Married Women's Property Act of 1872, an Act with much wider provisions than the English Act, emphatically declare that our Act had no such object or effect.

I would not have ventured upon the opinions I have above expressed, in the face of the great and weighty authority against them, had I not felt satisfied that if the recent decisions of *Pike v. Fitzgibbon*, L. R. 14 Ch. D. 837, and *Flower v. Buller*, L. R. 15 Chy. D. 665, had been in existence and brought to the notice of Gwynne, J., he would never have placed the construction upon the concluding part of the 9th section which he did, and which has since been followed.

Since those cases have been decided, I think this con-

struction is no longer concluded by authority, but must be treated as open to revision.

I am of opinion, therefore, the plea of coverture pleaded in this case affords no bar to the plaintiff's claim, that the verdict should stand, and the rule be discharged.

I may add, that I do not agree that the female defendant had not separate estate of that particular quality in reference to which she could contract.

HAGARTY, C.J.—The question before us is as to the liability of the defendant Gordon, a married woman, on a promissory note signed by her and her brother, the other defendant. The note is for \$400, dated 25th November, 1879, at three months.

To her plea of coverture the plaintiff replies that she was married after the 2nd March, 1872, and at the making of the note she was possessed of separate real and personal estate, owned by her at and prior to her marriage: that there was no settlement: that her husband had no interest therein: that the note was her separate contract, made by her and accepted by the plaintiff on the faith and credit of such separate estate; and that she is now in possession, and continues to be the owner thereof.

At the trial her father's will was proved. He died on the 11th November, 1872. She was married on the 15th October, 1878. The will appointed his son John (the defendant) sole executor and trustee, but directed that on his daughter (the defendant) attaining twenty-one, she should become a trustee with his son.

He devises all his estate to his trustees, on trust to sell it, or such portions as Mr. Beatty, therein named as his trustees' adviser, should deem expedient, and out of the proceeds to pay debts, &c., to invest the residue of the proceeds and such other moneys, (other than income) as Beatty should think fit, and to pay and expend the income of his estate in the maintenance and education of the trustee and his other children, until the youngest surviving child shall attain twenty-one, except that if any child marry

without Beatty's consent, or cease to reside with the others, he or she shall not be maintained out of said income, but it shall be applied for the maintenance, &c., of the others.

On the youngest attaining twenty-one, the whole estate to be equally divided among his children, including his said executors, the issue of deceased children to represent the parent.

The youngest child is not yet of age.

The note sued on was signed by the defendants as trustees. It was to raise money to pay some insurances on the trust estate.

Except under her father's will it was not urged that she had separate estate. I do not propose to discuss whether her signature as trustee makes any difference in her liability, nor some statements made in her examination put in at the trial, as to assigning her interest long ago to Beatty for money borrowed.

It is settled by authorities binding on this Court, that to maintain this action against the married woman defendant, it must be shewn that she was possessed of separate estate: *Darling v. Rice*, 1 App. R. 43; *Lawson v. Laidlaw*, 3 App. R. 77; *Standard Bank v. Boulton*, 3 App. R. 100, and many cases in this Court and the Common Pleas.

The question remains, is it shewn that she had such estate? I am clearly of opinion on the authorities that, at all events, until the coming of age of the youngest child she has no such estate. Until that even the annual income is to be applied to the support, &c., of all the children. The division of the corpus of the estate is then to take place.

Field v. McArthur, 27 C. P. 15, is conclusive in defendant's favour. Certain property under a deed was conveyed to trustees for a wife's sole and separate use during her life; but until her children should attain twenty-one the property was to be used for her and their maintenance. The youngest child was only thirteen. It was held that during the minority this was not properly available for the plaintiff's demand, and was not available by execution.

It was also held that judgment could not be given to be enforced hereafter when the youngest attained full age. Mr. Justice Gwynne's judgment is very clear on the point. He also notices that by the effect of the deed she would be a trustee for the children's maintenance.

The late much lamented Chief Justice Moss said, in *Standard Bank v. Boulton*, 3 App. R. 99: "The whole scope of this legislation seems to be directed towards estates in which the wife had an immediate possessory interest, estates of which there were or might be rents, issues, and profits; estates in which at common law, and but for special legislation, the husband would have had an interest for life to the exclusion of the wife, and might have a tenancy by curtesy after her death."

As to what property can be taken in execution, see *Fisken v. Brooke*, 4 App. R. 8.

In this clear state of the authorities binding upon us, I decline, as a Judge of first instance, entering into any questions or discussions as to the correctness of the principles on which they were decided.

We have been referred to the case of *Pike v. Fitzgibbon*, L. R. 14 Chy. Div. 837, decided last year by Sir Richard Malins, V. C. It amounts to this, that the decree against the married woman is against the separate estate which she has at the time judgment is given. The enquiry is directed according to the form in the decree of *Picard v. Hine*, L. R. 5 Chy. App. at p. 278. There it was decreed that the separate property of S. H. vested at this present date in her, or in any other person in trust for her, be chargeable with plaintiff's claim. Sir R. Malins' decree is to the same effect.

He holds, p. 844: "Where a married woman creates an obligation upon her separate estate, it extends not only to that which she has at the time, but to that which she may in any way acquire, and may have at the time when judgment is recovered."

In *Flower v. Buller*, L. R. 15 Chy. Div. 675, Denman, J., follows this last case. But it must be specially borne in

mind that in both the cases there was an express contract by the married woman to bind the expected future estate. Denman, J., says: "It is an authority, at all events, in a case where the evidence is clear that there was an intention to charge the very property which comes to the married woman."

I refer to an article on the two cases in the "Law Times," for July 31st, 1880, page 241. See *Pike v. Fitzgibbon*, before Fry, J., 41 L. T. N. S. 150, and that learned Judge's remarks.

In *Barber v. Gregson*, 43 L. T. N. S. 428, in the Court of Appeal, judgment was given in April last. Cotton, L. J., says: "Before you can get judgment against a married woman's separate estate, as if she were *feme sole*, you must establish that at the time the debt was contracted the married woman had separate estate." See the form of decree. This case is not cited in either of the last two cases.

Even if this view of the law be correct, it cannot affect our decision here. There is no separate property shewn to exist, either at the time of contract or now when we give judgment, which, according to the law distinctly laid down both in our Superior Courts and Court of Appeal, comes under the head of separate estate available in execution.

I think the plaintiff has not proved his replication to the plea of coverture, and that thereon there must be a verdict for defendant Gordon, or, if the plaintiff prefer it, a nonsuit generally. See also a notice of a later case of *Mortlock v. Fitzgibbon*, and the preceding cases, in the "Law Times," February 12, 1881, p. 254.

CAMERON, J., concurred, feeling himself bound by the decided cases, otherwise he would have agreed with ARMOUR, J.

Rule accordingly

GRIFFIN V. PATTERSON AND WIFE.

Husband and wife—Separate estate—Tenancy by entireties.

Action against husband and wife for the price of goods supplied in 1877 by plaintiff to the female defendant, who was married in 1856 without a marriage settlement, and who lived with her husband and family. The husband and wife were devisees in fee of land under a devise to them in 1863, and the sheriff had, in 1874, affected to sell to the wife the husband's interest in the land under an execution against the husband: *Held*, that the wife's interest in the land was not such as to entitle the plaintiff to a remedy against it.

Held, also, ARMOUR, J., dissenting, that she was not liable to the plaintiff for the goods sold.

Per HAGARTY, C.J.—The fact of a woman (living with her husband and family) ordering household goods does not raise an implied personal promise to pay or bind her separate estate, or any other presumption than that she is acting as her husband's agent; and the interest of the husband, being inalienable, was not saleable under execution, under R. S. O. ch. 66, sec. 39.

Per ARMOUR, J.—(1) That whatever might be the effect of the sheriff's sale, it should be treated according to the effect ascribed to it by the plaintiff's and female defendant's conduct, viz., as having vested the estate in her. (2) That from the evidence, set out below, it was the fair inference that the claim was the separate debt of the wife, part of it having been incurred by her in respect of the business of farming, in which she appeared to be engaged on her own account; that she had contracted in respect of separate personal estate appearing to be hers, and that the husband's name should be struck out and a verdict entered for the amount against her.

Per ARMOUR, J.—*Quære*, whether the effect of the Married Women's Acts may not be to do away with the estate by entireties, and make husband and wife, when devisees, tenants in common.

ACTION on the common money counts against husband and wife.

Plea, by wife, that she was a married woman.

Replication: That the said Mary Patterson was married without any marriage contract or settlement, and after her said marriage, and after the 2nd day of March, 1872, acquired and thereby became and was and still continued to be seised, possessed of, and entitled to certain real estate, to wit, the east half of lot number fifteen, in the eighth concession of the township of Otonabee, in the county of Peterborough, and other lands, and also certain personal estate, all of which by virtue and force of the statute, in that behalf, became and was, the separate pro-

perty and estate of the said defendant, Mary Patterson, and the said Mary Patterson having acquired such separate estate, contracted jointly with her co-defendant the indebtedness in the declaration set out for the benefit of and in respect to, and on the credit of her said separate estate, and the said indebtedness to the extent of her liability thereon was her separate debt, engagement, and contract.

The case was tried before the Chancellor at the Chancery Sittings held last Spring, at Peterborough.

The facts were as follow :—

The alleged separate estate consisted of land, a farm in Asphodel. The husband and wife married in 1856. The property was subsequently acquired ; first, by devise to the husband and wife in 1866 ; secondly, by purchase by the wife at sheriff's sale of the husband's interest, conveyed by sheriff's deed, dated 24th February, 1874.

The plaintiff was a country storekeeper, and the action was for goods sold to the husband and wife, or, as put at the trial, to the wife, in the year 1877, chiefly beginning with January or March of that year. It was not clear whether the goods were sold for household use in the family of the husband and wife, who were living together. Some items of small amount were for moneys paid on orders drawn by a daughter with the authority of the wife, and signed " Mrs. A. Patterson," all in the handwriting of the daughter. In the plaintiff's books the account was headed, " Mrs. A. Patterson, Dr." An account for 1876, settled in March, 1877, was so headed. The account sued upon, the only subsequent account rendered, was also so headed. There was no evidence of any direct undertaking to pay by the wife. Most of the goods were got by the wife herself from the plaintiff's store, some by grown-up children, none by the husband. A daughter, grown-up, gave evidence that upon the settlement in March, 1877, of the plaintiff's account of the previous year, a dispute arose as to some items, and the wife desired the plaintiff not to charge anything more in her name. The dealing, however,

afterwards continued as before, goods sold being charged to the account of the wife. As to orders, they were of small amount, and a payment was made by the wife generally on account, sufficient in amount to cover them.

SPRAGGE, C., [after stating the facts, as above.]—These orders may stand on a different footing from goods sold, as the giving of the orders would raise an implied assumpsit to pay them.

The defence is general, that the wife having married before 1859, she was not competent to contract in respect of her real estate. Several cases are cited on both sides; some before and some after the Married Women's Act of 1872. Before that Act it was held in several cases that the wife was not competent to contract. After the passing of the Act, the question came up in *Dingman v. Austin*, 33 U. C. R. 193, and it was also held that the incompetency of a woman married before 1859 was not removed by the Act of 1872; and this was followed in the Common Pleas in *McCreedy v. Higgins*, 26 C. P. 233. Mr. Beck says that upon the question subsequently coming up in the Court of Chancery in *Adams v. Loomis*, a distinction was taken where the property of the married woman was acquired after the Act of 1872, and that it was held that as to such property she was competent to contract. He concedes that as to property acquired before 1872, a woman married before 1859 is not competent to contract. I will examine the cases cited. If Mr. Edminson is right, there is an end of the case as regards the wife. If *Adams v. Loomis* is to the effect stated by Mr. Beck, the question remains, whether the wife is liable in the absence of direct promise to pay. Does the law raise an assumpsit, upon a married woman, having real property of her own, getting goods for the use of the household of which her husband is the head, that she will pay for them; and if not, is there anything in the circumstances under which these goods are purchased to raise an assumpsit?

I suppose the small money orders may be put out of the case, as she paid sufficient to cover them, and the payment would be appropriated to that for which she was liable.

Since my return from circuit, I have examined the judgments of my learned brothers in *Adams v. Loomis*, 22 Gr. 118. When the case was before my brother Blake alone, he said: "I think Mrs. Loomis had the power to

contract as to her real estate, notwithstanding that she was married before the 9th of March, 1872, and that the part of section 1 subsequent to the semicolon is in force so far as any married woman is concerned." My brother Proudfoot, upon the rehearing of the case, 24 Grant 242, after observing that *Dingman v. Austin* and *McCready v. Higgins* had probably been pushed further than was intended by the Judges who decided them, said: "It is only when these married women had property before the passing of the Act, in which their husbands, under the then state of the law, had an inchoate estate, that applying it to them would make it operate retrospectively." I expressed no opinion upon the point, my view of the case rendering it unnecessary.

I should incline to agree in the observation of my brother Proudfoot as an abstract proposition. I am not sure that my brother Blake intended to go further. If he meant to say that the latter part of section 1 applies to all married women, whether married before or after the Act of 1872, and whether her real estate has been acquired before or after the passing of that Act, I am not prepared to go so far.

In *McCready v. Higgins*, it was held that under the Act of 1872 a married woman is liable only upon contracts entered into on the credit of her separate estate; and that the real estate of a woman married before the first Married Women's Act, 1859, not settled by marriage settlement or deed, is not her separate estate. The Act of 1859 had been already interpreted in the same way in *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, and in *Mitchell v. Weir*, 19 Gr. 568.

The following are among the conclusions recapitulated in the judgment of the Court of Appeal in *Lawson v. Laidlaw*, 3 App. R. 90: "A promissory note made by a married woman for a debt of her husband, is not a contract binding upon her personally, either at common law or under the statutes." At p. 91: "When a married woman who has separate property contracts a debt, she is deemed, in equity, to have contracted it with reference to her separate property, and intending that it shall be paid out of that property. Therefore, if she had power to dispose of her property, equity will make it liable for the payment of the debt."

"The property so made liable must be property with reference to which she may be supposed to have contracted,

and therefore must be property to which she is entitled when the debt is incurred."

"I have confined these propositions to personal property, which is all that we are immediately concerned with.

"I may say, however, that my present opinion is, that they equally apply to real property coming under the Act of 1872. The wife's interest in that property is as free from all control of the husband as her interest in her personal property."

Up to 1872 the husband of a woman married before 1859, without marriage settlement, had an interest in property of his wife acquired before 1859, or after 1859 and before 1872, and up to this latter date such property was not the separate property of the wife. The Act of 1872 divested the husband of all interest in such property, limiting the operation of the Act, as in *Dingman v. Austin*, as far, at any rate, as the earlier part of the first section, to the case of marriage contracted after the passing of the Act; and this interpretation has been virtually adopted in subsequent legislation. See R. S. O. ch. 125, secs. 3, 4.

There is another state of circumstances, not in terms provided for,—marriage before 1859 and property acquired by the wife after 1872. The Revised Statute, in section 3, deals only with cases where the marriage is between 1859 and 1872, and, in section 4, where the marriage is after 1872, and it is only in the latter case that the wife is enabled to enjoy her real estate "free from any estate therein of her husband during her lifetime * * and from any claim or estate by him as tenant by the curtesy;" and that her receipts alone are made a discharge for rents, issues, and profits of the same.

In *Kræmer v. Glass*, 10 C. P. 475, it was said by the late Chief Justice Draper, speaking of the Married Woman's Act of 1859, "Every provision for these purposes is a departure from the common law; and so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give." This is undoubtedly sound doctrine.

The statute does not touch the case of real property acquired by the wife after 1872, except in cases where the marriage is after that date. By the common law it would not be separate estate; nor was it made so by the Act of

1859, as interpreted in the several cases to which I have referred.

Assuming, therefore, that the goods in question were obtained from the plaintiff by the defendant upon her own credit, her real property is not liable to pay for them, whether that property has been acquired by the wife before or after the passing of the Act of 1872.

It appears as a fact that the goods in question were furnished after the passing of the Revised Statutes.

In *Adams v. Loomis* the property that was in question was not the real property of the wife, otherwise than as it was made so by the agreement of the husband and wife upon their separation, by which agreement a farm lot of 200 acres, the property of the husband, not of the wife, was to be divided between them; and, as put by my brother Blake, 22 Grant 116, "in the property the wife was to get the husband was to have no interest. She took as absolutely the part of the property that fell to her lot, as did the husband the portion of it which fell to his;" and in this we all agreed. Our opinion was, that the husband was to hold his portion free from all claim of dower by the wife, and the wife her portion free from all claim of marital right by the husband, her portion thus being separate estate; and that was the *ratio decidendi*.

The verdict must therefore, in my opinion, be for the defendant.

November 15, 1880. *N. D. Beck*, obtained a rule *nisi* to enter a verdict for the defendants, or a nonsuit; or for a new trial, on the law and evidence.

November 27, 1880. *Edminson* shewed cause. The plaintiff has wholly failed to prove his replication. There is no evidence whatever of the wife having at any time promised or agreed to pay or become responsible for the account sued for. There is no evidence whatever of her having contracted jointly with her co-defendant the alleged indebtedness, as stated in the replication; but there is evidence given by her daughter that she expressly forbade the plaintiff to charge the goods sued for to her, giving him clearly to understand that she would not be responsible; and this evidence is sufficient to rebut any presumption that she intended to pay out of her separate

estate. And there is no evidence that the goods were purchased for the benefit of or in respect to, or on the credit of her separate estate, as alleged in the replication. The plaintiff has therefore failed to prove several material allegations in his replication, and for this reason alone is not entitled to recover. In the case of *Darling et al. v. Rice*, 1 App. R. 43, it is clearly laid down that without proof of these allegations the plaintiff cannot recover. In this case the husband and wife are living together on a farm, and the husband, being the head of the family, is legally in possession of that farm, as was expressly decided by this Court in the case of *Lett v. The Commercial Bank*, 24 U. C. R. 552, and the issues and profits of the farm are his, and not the wife's. The wife is therefore not engaged in, or carrying on any trade or business of her own separately from her husband; and there has in fact been no attempt to prove that she was. The farm was worked and carried on for the general benefit of the family, and the law casts the duty on the husband of providing for his family. Therefore any debt contracted for goods for general household use, such as these goods were, which is the subject of this action, is not the separate debt of the wife, nor the joint debt of the husband and wife, and even though the goods had been all obtained from the plaintiff by the wife, the law raises no assumpsit on her part to pay. It is therefore clear that she is not liable. And on the pleadings, as they now stand on the record, there can be no verdict against the husband. The declaration alleges only a joint liability of husband and wife, and does not charge any several liability on the part of the husband; and besides this, the plaintiff himself, who was examined as a witness on his own behalf at the trial, denies having given the credit to the husband, and disclaims all right to look to him for his debt, alleging through his counsel at the trial that he was only joined for the sake of conformity, and expressing his willingness to have his name struck out, and it is difficult to understand on what principle he can now claim to have a verdict against the husband; he is not entitled now to

claim that which he disclaimed on the trial. The plaintiff at the trial relied upon the documentary evidence put in for the purpose of proving that the wife was possessed of separate estate, and contended that she having obtained most of the goods from plaintiff's store herself, (although some were got by grown up members of the family,) the law would presume that she intended to pay for them out of her separate estate, and that she obtained them on the faith and credit of her separate estate, although there was no direct promise or undertaking on her part to pay for them, or to be in any way responsible; and as a fact, which appears in the evidence of her daughter, she had told the plaintiff distinctly that the goods were not to be charged to her. As to this, the evidence does not shew that the wife was possessed of any separate estate. The evidence relied upon to prove separate estate consists of a will of one Elizabeth Hartley, the wife's mother, under which the land mentioned in the replication was devised to the husband and wife jointly, the will being dated the 9th of April, 1866, and of a sheriff's deed from the sheriff of the county of Peterborough to the wife of the husband's interest in the land, such interest having been seized and sold under execution against the husband. The sheriff's deed is dated the 24th of February, 1874, the sale being on the 9th of December, 1873. This is the only evidence offered to prove separate estate in the wife. It is clear that under the will the wife took no separate estate, as her husband was a joint owner, until the sale of his interest by the sheriff in February, 1874. Then, on and after that date did this lot of land become her separate estate so as to enable her to contract with reference to it? It is submitted that it did not; and if not, she, having no other separate estate, and not being engaged in, or carrying on any trade or business separately from her husband, to enable her to bind herself by contract in reference to it under the statute, would not be liable even upon an express undertaking to pay (which did not exist in this case). The defendants were married before the passing of

the Act known as the Married Women's Act of 1859 (having been married in 1856), and the documentary evidence relied upon to prove separate estate, shews that the wife did not acquire the property alleged to be separate estate until February, 1874, which was after the passing of the Married Woman's Act of 1872; and neither the Act of 1859, nor the Act of 1872, deals with real estate owned by a married woman under these circumstances, and it is therefore held by the wife subject to the marital rights of the husband in the same manner as before the passing of these Acts, and is not her separate estate. It has not been declared to be her separate estate by any Act, nor has it been settled upon her as such by any instrument; and, as stated by Draper, C. J., in *Kraemer v. Gless*, 10 C. P. 470, every provision for these purposes is a departure from the common law, and it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give. In *McCready v. Higgins*, 24 C. P. 233, it was expressly held that the real estate of a woman married before the passing of the Act of 1859, not settled by marriage settlement or deed, is not her separate estate. The same was stated in *Johnstone v. White*, 40 U. C. R. 309. The Court of Chancery also interpreted the Act of 1859 in the same way in the case of *The Royal Canadian Bank v. Mitchell*, 14 Grant 412, and in *Mitchell v. Weir*, 19 Grant 568. And the Act of 1872 does not touch the case of real property acquired by the wife after 1872, except in cases where the marriage is after that date, as was decided in the case of *Dingman v. Austin*, 32 U. C. R. 193, which was followed by *McCready v. Higgins*, in the Court of Common Pleas. Besides this, the Legislature, in order to remove every doubt regarding the operation of the Act of 1872, in the revision of the statutes have adopted the interpretation put upon that Act by the Court in the case of *Dingman v. Austin*, 33 U. C. R. 190, for we find that by R. S. O., ch. 125, sec. 4, which is the first section of the Act of 1872, as revised, the wording of the section is so changed as to

make it apply only to marriages after the passing of the Act. The original section reads: "After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during coverture," &c. The same section down to the semicolon, as revised, reads: "The real estate of any woman married after the 2nd day of March, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture," &c. As the law stands, the real estate of a married woman married before the second of March, 1872, is held by her in the same manner as it was before the Act of 1872 was passed. The conclusion to be drawn from the statutes and from the cases is, that under the Act of 1859 real estate owned by a married woman, and in the enjoyment of which she is protected by that Act, is not her separate estate, as expressly held in *McGuire v. McGuire*, 23 C. P. 123, and followed in subsequent cases, especially approved of by the Court of Appeal in *Darling v. Rice*, 1 App. R. At p. 52 the Chief Justice says: "It was decided in cases of high authority that a married woman's capacity to contract was not enlarged by the Act of 1859. Even if she were the owner of property which came under the protection of that enactment, and was in that sense separate, she was not liable to be sued upon her contracts." And the Act of 1872, as revised, does not make the real estate of married women separate estate except in cases where the marriage took place after the 2nd of March, 1872; therefore real estate of married women married, as this defendant was, before the Act of 1859, is not separate estate, and is not such estate as would enable her to bind herself by contract, even if there had been one made, of which there is no evidence; and under the circumstances under which the goods in question were obtained, the law raised no assumption that she would pay for them. Under the Act of 1872 (now sec. 20 R. S. O. ch. 125,) it is only for her separate debts, engagements, contracts, and torts, that she can be proceeded against separately. Here there is no

separate debt, contract, or engagement; and it was held in *McCready v. Higgins* that the effect of this section was to regulate the procedure, and not to enlarge her power to bind herself by contract, nor to extend her liability.

N. D. Beck, contra. There are two points for decision: (1.) Is the debt sued for the debt of the wife or that of the husband? (2.) If the wife's debt, is the property in question here separate estate? As to the first. The evidence shews the wife owned the land upon which her husband and their family lived: that she employed and paid the labourers and managed the farm generally: that the greater part of the account was for goods furnished to the wife in person, or to persons presenting her written order signed "Mrs. Patterson," and the balance of the account consisted of goods got by her children: that the husband was actually refused credit by the plaintiff, and had got nothing which was contained in the account. Previous accounts were rendered, paid and receipted, in the wife's name, and she paid money personally on account. The only disagreement in the evidence for plaintiff and defendants is with regard to what took place in March, 1877, when the wife brought in the account rendered to December, 1876, and settled it in full. Defendant's daughter says her mother told plaintiff not to book anything more to her. Plaintiff denies this, and the dispute seems to have been only as to some articles which had been returned and were deducted in making the settlement. The account from the previous January, which is part of the account sued upon, was not settled and was continued as before. It also appears that when the husband wanted anything at plaintiff's shop he would ask his wife for a written order, shewing that both the husband and wife knew the plaintiff gave credit to the wife. These facts are very strong evidence that the debt is the debt of the wife, not of the husband: *Bentley v. Griffin*, 5 Taunt. 356; *Freestone v. Butcher*, 9 C. & P. 643; *Reid v. Teakle*, 13 C. B. 627; *Lane v. Ironmonger*, 13 M. & W. 368; *Kelner*

v. *Baxter*, L. R. 2 C. P. 174, 185; *Jolly v. Rees*, 15 C. B. N. S. 628. The mere ownership of separate estate is sufficient evidence to make the wife liable; *Freestone v. Butcher*, *supra*; *Lawson v. Laidlaw*, 2 Ap. R. 77. A married woman is liable on an implied assumpsit: *Hodgson v. Williamson*, L. R. 15 Chy. D. 87. As to the second point. The farm property was owned in 1866 by the husband and wife as tenants by entireties. In 1874 the wife bought the interest of the husband at sheriff's sale. [ARMOUR, J.—I doubt very much whether such an interest is saleable.] It has been so held: *Ames v. Norman*, 4 Sneed (Tenn.) 683. *Bishop on Marriage and Divorce*, 716, *Id.* Married Women, 622. If the sale was valid the property is her separate estate: *Adams v. Loomis*, 22 Grant 99, 24 Grant 242; *Standard Bank v. Boulton*, 3 App. R. 93; *Frazee v. McFarland*, 43 U. C. R. 281; *Harrison v. Douglass*, 40 U. C. R. 411; *Furness v. Mitchell*, 3 App. R. 510. The application made at the trial, to have the husband's name as a defendant struck out and the proceedings amended accordingly, is now renewed.

February 12, 1881. HAGARTY, C.J.—I have to state my concurrence in the very careful conclusion which has been arrived at by the learned Chancellor, who tried the case. In the present state of the authorities, I do not see how there can be any other result.

A series of decisions in all our Courts has declared very clearly the effect of the statutes on this question. My duty is simply to decide this case according to this unmistakable interpretation.

In addition to the grounds stated in the judgment, an important question arises, to which it does not appear the Chancellor's attention was directed or his judgment asked, viz., does the evidence shew that the wife pledged her personal credit to the plaintiff? There is no evidence of any express agreement or pledge of credit between her and the plaintiff. She was residing with her husband and family, and all the goods obtained from the plaintiff were

for use in the family. The farm on which they lived was (apart from a question on a sheriff's sale discussed afterwards) owned by husband and wife in entirety, under a devise to them as husband and wife.

The plaintiff swears that he would not have trusted the husband, and only gave credit on the faith of her owning the property.

No case, as far as I am aware, has decided that a married woman living with her husband and family must be held to pledge her personal credit or bind her separate estate merely by ordering goods for the ordinary wear, use, or support of herself, her husband, and children.

I certainly am not prepared, unless bound by authority, to accede to such a proposition.

I can see no legal implication resulting from a woman so ordering household goods, other than that she is doing so on her husband's credit and authority. He is still, according to my opinion, (old fashioned as it may perhaps be considered,) the head of the family. Those who may be unwilling to trust to his credit or responsibility have, I think, the burden thrown on them to prove that the trust was given on the plighted credit of some other member of the family.

When the wife actually does pledge her credit, or does obtain goods on her promise to pay, the legal implication may be rebutted.

I cannot believe that the Legislature ever intended that a married woman living with her husband and family becomes, by the mere fact of her possessing some separate provision, liable for the household stuff or provisions ordered by her in the ordinary way as managing the household.

Apart from all this remains the question, undecided by the Chancellor's judgment, whether the estate she has comes under the head of separate estate, without reference to the date of her marriage or the passing of the Act of 1872.

The land is devised by the husband's mother's will: "I give and devise to my beloved children, Alexander

Patterson and Mary Patterson, and to their children and children's children, for ever, all and singular that certain parcel," &c., describing this land; "provided always, that the aforesaid Alexander Patterson and Mary Patterson shall not be at liberty at any time, or for any purpose, to convey or dispose of this land, as it is my will that the same be entailed for the benefit of their children."

It is shewn that in 1874, on executions against the husband, the sheriff assumed to sell all his interest in this land to the wife for a consideration of \$25.

We have to enquire if anything passed thereby.

By our R. S. O. ch. 66, sec. 39, it is declared that any estate, right, title, or interest in lands which, under sec. 5, R. S. O. ch. 98, could be conveyed or assigned by any party, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution, and the sheriff may convey and assign the same to purchasers in the same manner and with all the same effect as the party might himself have done.

The section referred to declares that "a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, may be disposed of by deed; but no such disposition shall by force only of this Act defeat or enlarge an estate tail, and any such disposition by a married woman shall be made in conformity with the provisions of the 'Married Woman's Real Estate Act.'"

Then can this property be seized on execution against the husband? It appears that it cannot—that he could not alien his interest.

In Com. Dig., *Baron & Feme*, D. 2, it is said: "The entire estate is in both. * * If the husband commit treason and dies, the wife shall recover the entire estate from the king, who seized it as forfeited: *Co. Lit.* 187 a."

Again: "If husband and wife take an estate, and the husband alone aliens the whole, it is not good for a moiety. *Semb. Coke El. 187. b.*"

In 1 *Preston* on Estates, 131, *et seq.*: "From the unity of their persons by marriage, they have the estate entirely as one individual, and on the death of one of them the entire tenement will, for all the estate of which they are seised in this manner, belong to the survivor, without the power of alienation or forfeiture of either alone to prejudice the right of the other."

In *Doe v. Parratt*, 5 T. R. 654, Lord Kenyon says: "It has been settled for ages, that when the devise is to the husband and wife they take by entireties and not by moieties, and the husband alone cannot by his own conveyance, without joining his wife, divest the estate of the wife."

In 1 *Bright*, Husband and Wife, vol. i. p. 25, it is said: "A husband cannot alone convey the property so as to affect the interest of the wife surviving, who will be entitled to the whole," citing the authorities.

In *Back v. Andrew*, 2 Vern. 120: "The husband cannot alien or dispose of it so as to bind the wife." They held in entirety.

I do not think any thing in our statute, ch. 98, sec. 5, altered the law as to the rights of parties in estates, but merely altered the law as to conveyancing.

I think the sheriff could not have seized this land on execution against either husband or wife, and therefore could convey nothing by his deed. If the husband survive the wife here, he can claim the whole, in my view, unaffected by the sheriff's seizure and sale.

It may be suggested that the husband might possibly have released his estate or interest to his wife: that though he could not alien or do any act to prejudice her interest, he could abandon or release his own in her favour; and if so, that she could purchase on sale on execution against him.

I do not think so on the evidence before us. The sheriff declares that he has seized and taken all the husband's

interest in the land. There was nothing to seize or sell. If so, I do not see how the accident of the wife being the highest bidder at the sale, which was illegal, can make good the sheriff's proceedings and create any fresh title in her.

Sir James Macaulay says, in *Doe Miller v. Tiffany*, 5 U. C. R. 90: "A seizure is looked upon as an execution of the writ, on the principle that it is indivisible, and being commenced must be completed, the levy or seizure being the principal thing, and a sale afterwards only subsidiary or consequential to raise the money."

I think the rule against the verdict must be discharged.

ARMOUR, J. No facts were found by the tribunal which tried this cause, and as it is in my view essential to the proper determination of the cause that it should be ascertained whether the plaintiff's claim or any part of it, and if so what part, was the debt of the wife, incurred by her in respect of any employment or business in which she was engaged on her own behalf, or whether it arose by virtue of her own contract, or whether it was in any respect her separate debt, I think a new trial should be had in order that this may be done. If however that course is not adopted, I must draw the best conclusion I can as to these facts from the evidence adduced at the trial.

The defendants, it seems, were married before the 4th day of May, 1859, without any marriage contract or settlement, and there is no evidence to shew that either of the defendants ever had at any time any property except what was derived under the will of Elizabeth Hartley, the mother of the male defendant.

It is not shewn when Elizabeth Hartley died, but by her will, dated April 9th, 1866, she devised the east half of lot 15, in the 8th concession of Asphodel, to the defendants and to their children, and children's children, forever, and thereby provided that neither of the defendants should be at liberty at any time, or for any purpose, to convey or dispose of the said land, as it was her will that the same

should be entailed for the benefit of their children. She also by her said will gave and bequeathed all the rest and residue of her estate, personal and mixed, of which she should be seised and possessed, or to which she should or might be entitled at the time of her decease, to the female defendant absolutely.

Under a judgment, recovered by one Thomas Smith, against the male defendant, for \$150.62, and under an execution against lands issued thereon, directed to the sheriff of the county of Peterborough, that sheriff, on the 9th day of December, 1873, sold all the estate and interest of the male defendant in the said land to the female defendant, for the sum of \$25, and afterwards on the 24th day of February, 1874, by deed of that date, conveyed such estate and interest to her.

Whatever may have been the legal effect, if any, of this sale and conveyance, we must, in dealing with the subsequent conduct of the plaintiff and defendants, treat it as having been what they believed it to have been, viz., to have vested the estate and interest of the male defendant in the said land in the female defendant.

In February, 1876, the time at which the female defendant first opened an account with the plaintiff, the defendants lived upon the said land, occupying it as a farm. The male defendant had no property. The female defendant owned all the property, real and personal. The plaintiff, knowing this, had refused to give credit to the male defendant; but afterwards, upon the female defendant coming to him and asking him to give her credit, he agreed to do so, opened an account in her name in his books, and furnished goods to her during that year to the amount of \$77.12, and rendered the account thereof, made out in her name, to her at the end of the year. This account, reduced by some trifling credits to \$70.02, the female defendant paid to the plaintiff on the 13th of March, 1877.

The plaintiff continued furnishing goods to the female defendant during the years 1877, 1878, and part of 1879, as he had previously done during the year 1876, charging

them to her in his books, and rendering the accounts thereof, made out in her name, to her at the end of each year.

The goods so furnished amounted in 1877 to \$140.66, for \$10.78 of which the plaintiff produced the written orders of the female defendant, six in number ; in 1878 to \$218.13, for \$19.36 of which the plaintiff produced the written orders of the female defendant, eleven in number ; and in 1879 to \$2.73, amounting in the whole to \$361.52.

On November 19th, 1878, the female defendant paid to the plaintiff generally on account the sum of \$50, reducing the amount to \$311.52, which sum was still further reduced by credits, some of which were for teaming done by the male defendant, no doubt with the team belonging to the female defendant, to the sum sued for in this action.

The female defendant engaged the men who worked on the farm and paid them. One of her orders, which the plaintiff paid in goods, was in favour of a man for harvesting on the farm ; others of her orders, paid in goods by the plaintiff, were in favour of a man for doing brickwork on the farm, and others of them were in favour of men for labouring on the farm.

I should draw the conclusion from the evidence that during the time of the transactions with the plaintiff the female defendant managed and carried on the business of the farm, and I think it would be safe to affirm that had the sheriff during that time seized, under an execution against the male defendant, any of the implements, stock, crops, or other personal property on that farm, the defendants would have proved beyond question that all such implements, stock, crops, and other personal property, were the property of the female defendant, and that the male defendant had no interest whatever in them, and very likely the male defendant would have sworn, as I have frequently heard husbands swear under similar circumstances, that he worked on the farm merely for his board, lodging, and clothes.

It was in effect admitted at the trial that the plaintiff's

claim was an honest one. The defendants did not offer to give evidence, but called their daughter to prove that the female defendant told the plaintiff, on the occasion of her paying the account for 1876 in March 1877, "not to book anything in her name again." The plaintiff denied that this took place, and I prefer to believe him; but even if it did, it amounted to nothing, for the female defendant gave orders for goods in her own name and paid the \$50 on account after this.

No particulars of the plaintiff's claim, shewing the different items of goods furnished, were put in at the trial, so that it is impossible to draw any conclusion from this source, but the plaintiff stated that they were for household use.

The conclusions of fact which I draw from the evidence are, that the plaintiff's claim was the separate debt of the female defendant, and that part of it was incurred by her in respect of the business of farming in which she was engaged on her own behalf. And following what I have said in *Clarke v. Creighton* (a), I think that the record should be amended by striking out the name of the male defendant, and that a verdict ought to be entered for the plaintiff against the female defendant for the amount sued for in this action.

I also think it a fair inference from the evidence that the female defendant had at the time the debt to the plaintiff was contracted, and still has, separate personal estate of that particular quality held to be necessary to entitle the plaintiff to a remedy against it, and that she contracted with reference to it in such a manner as to entitle the plaintiff to that remedy.

I think, however, it is quite clear that she had not then, nor has she now, separate real estate of that particular quality held to be necessary to entitle the plaintiff to a remedy against it, although I think it might well be contended that the effect of the Married Women's Acts is to do away with the estate by entires, and to make the devisees tenants in common.

(a) *ante*, 514.

I endeavoured to point out in my feeble way, in *Clarke v. Creighton*, a very few of the very many curious legal results that have arisen from the construction put upon the concluding part of section 9 of the Married Women's Property Act, 1872. The practical results of it have been particularly disastrous to creditors.

There are hundreds, I might say thousands, of cases throughout Ontario in which the husband has contrived that the wife shall own everything; she is wealthy he is worthless; his creditors are set at defiance because his wife owns the property; her creditors are set at defiance, because by the construction, to which I have adverted, her property is not of that particular quality of separate estate which will permit them to have a remedy against it.

CAMERON, J., concurred with Hagarty, C.J., considering himself bound by authority, though on the questions of fact he agreed with Armour, J.

Rule discharged.

REGINA V. HOODLESS.

Recognizance—Irregularity.

A recognizance taken before a Police Magistrate under 32-33 Vic., ch. 30, sec. 44, D., Form Q. 2 (Schedule), omitted the words "to owe": *Held*, fatal, and that an action would not lie upon the instrument as a recognizance.

THE first count of the declaration stated that the defendant on, &c., before J. Cahill, Police Magistrate, became pledge and bail in \$1,500 for one John Stewart, then in custody, before the said police magistrate, on a charge of larceny, that said John Stewart should appear on the adjournment, &c., &c., as by the record of said recognizance, taken before the said police magistrate, fully appeared: that John Stewart did not appear, &c., according to the terms of the said recognizance, whereby the condition of the said recognizance was broken, and whereby the said sum of \$1,500 became forthwith payable by the defendant to her Majesty the Queen.

The second count charged that the defendant on, &c., before J. Cahill, Police Magistrate, &c., acknowledged himself to owe our Sovereign Lady the Queen the sum of \$1,500, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Lady, &c., as appeared by the instrument of recognizance taken by and before the said police magistrate, if John Stewart should fail in the condition on said instrument of recognizance set forth. The condition for Stewart's appearance was then set forth, with averment that he did not appear, whereby the condition of said recognizance became and was broken and the moneys acknowledged by the defendant became payable, viz., the sum of \$1,500, &c.; and the plaintiff claimed \$2,000.

Pleas to first count: that defendant did not become pledge and bail as alleged, nor was there any record of the alleged recognizance.

To second count: that defendant did not acknowledge

himself to owe to the Queen the sum of \$1,500 as alleged. Issue.

The trial took place at the last Spring Assizes at Hamilton, before Sinclair, County Court Judge, sitting for Morrison, J., and a jury.

The material part of the recognizance was as follows :

Canada, Province of Ontario, County of Wentworth, City of Hamilton, To wit :	}	Be it remembered, that on the 13th day of June, in the year of our Lord 1879, John Stewart, of Hamilton, in the county aforesaid, yeoman, and Robert Young, of the same place, yeoman, and Joseph Hoodless, of the same place, yeoman, personally came before me, the undersigned, Police Magistrate of Hamilton, aforesaid, and severally <i>acknowledged themselves to our Sovereign Lady the Queen</i> , her heirs and successors, the several sums following.
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The rest of the recognizance was in the usual form.

It was objected that the omission of the words "to owe," was fatal, and that plaintiff could not therefore recover.

There was a verdict for the plaintiff, subject to this objection, for \$1,500.

May 20, 1880, *Robertson*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant on the law and evidence.

November 22, 1880, *Osler*, Q. C., shewed cause, contending that the omission of the words "to owe" was of no consequence.

S. Richards, Q. C., contra. The recognizance here is a mere acknowledgment of a certain amount to be levied of their goods, without saying to whom. The Court cannot import into the instrument the words "to owe."

The Court will not amend the recognizance: *Ex parte Higgins*, 2 Dowl. N. S. 713.

February 20, 1880. HAGARTY, C. J.—The whole difficulty is created by the omission in the printed form used of the words "to owe." The bail acknowledge themselves to the Queen, not "to owe" the Queen the sum mentioned.

The police magistrate made the statutable return on the back that Stewart did not appear, "but made default, by reason whereof the within recognizance is forfeited."

He also attached a certificate setting out the taking of the recognizance and the default, and addresses it to the Clerk of the Peace, and on the back is written, "Received fyled, and brought in Court of General Sessions, 17th June, 1879. B. OSLER, Clerk of the Peace."

According to the definition in the books a recognizance is "an obligation of record * * with condition to do some particular act. It is in most respects like another bond, the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*; the recognizance is an acknowledgment of a former debt upon record, the form whereof is, 'that A. B. doth acknowledge to owe to our Lord the King, * * the sum of £10,' with condition to be void on performance of the thing stipulated. * * The King is called the *cognizee*, *is cui cognoscitur*; as he that enters into the recognizance, is called the *cognizor*, *is qui cognoscit*." * * "And the person is charged, but the lands chargeable only." *Plowd.*, 72: 2 *Tomlyn's Law Dictionary*, "Recognizance." * * See also *Wharton's Law Dictionary*, "Recognizance." The word itself, "*recognitio*," is a thinking or reconsideration, or pondering over again, and the verb "*recognosco*" is to call to mind, to recollect, to remember. All this points to the admitting of a pre-existing state of facts, a debt already due. 5 *Burn's Justice*, 30th ed. 70, 71, "Recognizance." There it is defined, "A bond of record testifying the cognizor to owe a certain sum of money to some other." It need not be signed by cognizor, it is sufficient to be signed by the magistrate. "Acknowledged before me, J. P.; or only to subscribe his name." I refer also to *Rastall v. Attorney-General*, 18 Gr. 138, in Appeal, where there is much learning on the subject.

In the case before us we understand that the police magistrate could not give any further or better account of the taking of the bail than the document itself furnishes. It was apparently taken under section 44, 32-33 Vict. ch. 30, D. Where a prisoner is remanded, he may be discharged upon entering into a recognizance in the form (Q. 2, 3,)

appended to the Act, with or without sureties. The form is followed except in omitting the words "to owe." The form does not require the signature of the parties.

I have sought in vain for any authority as to the effect of such an omission.

On the best consideration I can give the case I have come to the conclusion that it fails in the important ingredient of a recognizance, viz., the acknowledgment of an existing antecedent debt. As the instrument reads it amounts to this, that the defendant acknowledged himself to our Sovereign Lady the Queen the sum following, that is to say, \$1,500, to be made and levied of his goods and chattels, lands, &c., to the use of our said Lady the Queen, if the said J. Stewart fail in the condition herein mentioned.

I do not think that these words can be held as equivalent to acknowledging that he *owes* the Queen \$1,500. No existing antecedent debt is acknowledged. "Acknowledged to the Queen" cannot fairly be said to amount to "acknowledged to owe to the Queen."

Unless we hold that the words "acknowledge to A. B.," means the same as acknowledge to owe A. B., the omission seems fatal. As it reads it may well be taken to read that the cognizor acknowledges that \$1,500 may be levied of his goods and lands to the use of the Queen, if the person bailed fail to appear. But such a construction would fall short of the settled effect of a recognizance.

It would not even be a *debitum in presenti*, it would be both *debitum* as well as *solvendum in futuro*. We cannot give such an extended meaning to "acknowledge." Admitting, confessing, conceding, owning, are its ordinary significances.

I think the evidence failed on either count of the declaration to shew a binding recognizance either on record or not of record, as in the case of *Glynne v. Thorpe*, 1 B. & Al. 153.

It is to be regretted that persons using printed law forms will not take the trouble of reading them to ascer-

tain whether essential words may not be omitted. I do not think that we are called upon to supply the want of apt words universally required to shew the nature of the transaction; nor need we discuss whether, as between individuals, the document before us would support an action of debt, or for breach of an executory contract. It is not, as we think, a recognizance, and it is only as a recognizance that this action can be or is sought to be maintained on it, and we must not confound such a well known and settled procedure with the ordinary proceedings in contracts between individuals.

I think the rule to set aside the verdict and to enter a verdict for defendant must be made absolute.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

MOFFATT V. THE RELIANCE MUTUAL LIFE ASSURANCE SOCIETY.

Life Insurance—General agent—Power to give time for premiums.

J. M. was insured by a life policy, under which thirty days' grace were allowed for payment of premiums, and a lapsed policy might be renewed within a year upon proof of health, payment of arrears, and a fine. S. was the resident secretary in Canada of the defendants, with the powers of a general manager, and there was a local board of directors in Canada, but S. managed all matters connected with the receipt of premiums, communicated directly with the board in England, took his instructions from them, and laid before them monthly accounts from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S. asking him to take a note at three months. S. replied, "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th August, 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S. to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that as the two premiums of November, 1878, and May, 1879, were so long overdue he should have to refer the matter to S. on his return, adding, "until these back premiums are paid the society is off the risk."

The death occurred on the 29th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, and due 10th August, 1879, which was unpaid, and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death the amount of these two notes was tendered to the defendants and refused. S. being examined, said he did his best to keep the policies alive, and had no doubt at the time of his authority to do so.

The jury found that the notes were taken by defendants' agent as cash payments; that the taking of them was within his authority; and that he had waived payment upon the dates the premiums were due; and a verdict was entered for plaintiff.

Held (HAGARTY, C. J., dissenting), that the evidence shewed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing shewing notice to the assured of any want of such authority: that the nonpayment of the note in August, 1879, while the other note was still current, did not determine the policy; and the verdict ought not to be disturbed.

Per ARMOUR, J.—The defendants in England had become aware by the returns sent by S. of the forbearance granted by him, and had ratified it.

Per HAGARTY, C.J.—Admitting that S. might accept payment after the proper time, he could not make a binding executory agreement to give further time, extending perhaps beyond the duration of the life.

THE plaintiff, widow of one James Moffatt, sued on a policy on her husband's life for \$10,000, payable to her.

It bore date 30th of June, 1871. The premiums were \$212.70, payable on the 30th of May and 30th of November in each year.

Several conditions were set forth in the declaration; among them thirty days were allowed for the payment of premiums beyond the days fixed, and if the life dropped within the thirty days, the overdue premium was to be deducted from the payment; and lapsed policies might be revived within a year, on satisfactory proof of health, &c., payment of arrears, and a fine.

The declaration then averred that the policy was duly kept in force by the payment of premiums until the death, averring death and general performance, &c.

A second count set out the policy, averring the death, and that before and at the time for payment of the two sums of \$212.70, being the half-yearly premiums due on the 30th of November, 1878, and 30th of May, 1879, the defendants waived payment of the same, and accepted the promissory notes of the said James Moffatt therefor, and except as aforesaid all conditions were performed, &c.

Pleas: To first count, *non est factum*, and traverse of payment of premiums, and averring default in payment of the half-yearly payments due November, 1878, and May, 1879, or within thirty days after these terms.

To the second count, *non est factum*, and traverse of the alleged waiver or acceptance of notes.

5. That they did agree to waive, &c., on the express condition that said promissory notes which they accepted, as alleged, should be paid when due, and if not paid that the policy should lapse: that default was made in payment, and the defendants were therefore discharged.

Issue.

The case was tried at the last Fall Assizes, at Toronto, before Morrison, J., and a jury, and a verdict was entered for the plaintiff for \$9,883.

The defence was rested on the non-payment of the two

last premiums. Moffatt died on the 29th of October, 1879. The last preceding payment should have been made on the 30th of May, 1879. A note for \$220.13, dated June 21st, 1879, made by Moffatt payable to Frederick Stancliffe or order, six months after date, not maturing till after the life dropped, represented that payment; and another note for \$221.21, due on the 9th of August, 1879, to the same payee, represented the payment due 30th of November, 1878.

The defendants were an English insurance company, the head office being in London. They established a branch in Montreal. Stancliffe was the secretary, with a board of four local directors. He was appointed by the head office, recommended by the board.

The policy issued in 1871, signed by three of the directors and "James Grant," resident secretary. No signatures of any English officials or directors were attached to it.

Notice of any assignments were directed to be given to the head office, London, or at the chief office for Canada, 229 St. James Street, Montreal. Stancliffe appeared to have had the general management of all office business, subject to the directors, who met whenever business required, and on the call of Stancliffe. He seemed also to have appointed sub-agents in different places. He was appointed in 1875.

There was some discussion at the trial as to the admissibility of evidence of the general authority of the secretary and the board. A copy of certain instructions and rules communicated to Grant, a predecessor of Stancliffe, was put in. They did not touch the main points in dispute. No. 13 directed that the secretary should render to the head office monthly statements of accounts, with monthly balance sheet. It directed monthly meetings of the Montreal board, with monthly accounts to be laid before them, shewing the bank balance, directors' account, and secretary's account separately.

There was also a letter put in from the head office to Stancliffe, of 24th of August, 1878, objecting that a policy

had apparently been written, if not issued, before the premium had been paid, adding, "We must again request that the rule be strictly observed, not to issue a policy from the Montreal office until the proposer has paid the premium. His bill or promissory note for the amount must not be accepted in lieu of the cash. We decline to recognize such a payment here, and the regulation is a most necessary one."

The first difficulty seemed to have been as to the half yearly premium due in May, 1878. It was not paid.

The first letter was from Stancliffe, October 24th, 1878: "I beg to remind you that your premium due last May has not yet been paid. If not done at once, the policy will be cancelled according to instructions received from our head office."

On October 30, 1878, Moffatt replied, saying he was in hopes the bonus would have been sufficient to meet the premium past due, and therefore did not prepare to meet it. He said: "All I can do now is to ask you to discount my note at three months, and I will meet it when due. If this is satisfactory, you can draw upon me, adding the interest, and I will accept, as it is almost impossible for me to pay the cash now. Please let me hear from you at your convenience."

Stancliffe replied, 2nd November, 1878: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose your draft for acceptance, which please return early. There will be another premium due in December."

On the 4th of November, 1878, Moffatt wrote, enclosing draft \$221.60, "which, with the premium due in December, will require all my exertions; however, I will endeavour to meet both if possible, if not, you will have to help me again; in the meantime I feel grateful."

On the 6th of November, 1878, Stancliffe writes, acknowledging the receipt of draft, "And when that is paid I will see if I can give you a short time for the one due in December."

On the 3rd of February, 1879, Moffatt wrote, enclosing cheque for \$140: "I also enclose note signed for you to fill for balance due you, with interest and premium to date and which I will attend to."

On the 4th of February, 1879, Stancliffe wrote: "I am in receipt of your favour of 3rd inst., with cheque for \$140, with note signed blank for the balance, the amount of which is \$82.62, and I have accordingly entered that amount on the note. You must bear in mind that this is for last May's premium, and there was another one due last November, for which you must give me a note not longer than six months. Our directors at the head office are now very particular regarding over due premiums."

P.S.—The amount of the note for November premium at six months, will be \$221.21.

On the 7th of February, 1879, Moffatt wrote: * *
"In accordance with your request, I enclose note at six months for \$221.21, being the balance owing you for premium and interest due last November."

On the 8th of February, 1879, Stancliffe wrote: "I am in receipt of your favour of the 7th inst., with note for \$221.60, which falls due the 9th of August next. * *
I beg to hand you your old note for \$221.60."

On the 30th of April, 1879, Stancliffe wrote: "I beg to notify you that your note for \$82.62, held by us, falls due on the 6th of May next, payable at the Imperial Bank, Toronto, for which please provide."

On 20th May, 1879, Moffatt wrote: "I paid your note on the 6th inst. You have not sent me any receipts for the two last premiums; please forward and oblige."

On 21st May, 1879, Stancliffe wrote: "Yours of 20th to hand, and now beg to enclose receipt for half yearly premium due on 30th May, 1878. The receipt for November, 1878, will be forwarded when note paid that is due on 9th August next."

On the 21st June (qy. 20th), 1879, Moffatt wrote: "I enclose you my note signed in blank for you to fill in for the amount of the premium due on the 30th, adding the

interest. Please let me know how much, and send me a receipt therefor."

On June 21st 1879, Stancliffe wrote: "I am in receipt of yours of the 20th, with blank note signed, which I have filled as requested for \$220.13, being for premium and interest, due at Imperial Bank of Canada, on December 24th, 1879."

On 8th August, 1879, Moffatt wrote: "I find it impossible to pay my note due to-morrow, and must ask you to renew for two or three months, when I will pay in full."

Then followed excuses for non-payment, and he concluded: "Please oblige me this time."

"P. S.—I enclose a blank note for you to fill up for the amount and time, and send me notice thereof."

On 9th August, 1879, in answer, Easty, who was defendants' cashier, wrote: "I am in receipt of yours of 8th inst., and beg to state that as the resident secretary is at present out of town, and your two premiums, viz., November, 1878, and May, 1879, being so long overdue that I shall have to refer the matter to him on his return. You will please, however, bear in mind that until these back premiums are paid, the society is off the risk."

The blank note referred to in deceased's letter of 8th August, was produced by the defendants. It was not signed by deceased, merely the date and payee's name and place of payment. The other two notes were produced also by them, that of the 7th February, 1879, for the preceding November premium, and that of June 21, 1879. They were each payable to the order of Frederick Stancliffe, and at the Imperial Bank, Toronto. They were not endorsed, and did not appear to have been used or discounted.

This was all the correspondence produced.

The death occurred about two months and a half afterwards, viz., on the 29th October, 1879. There appeared to be no trace of any further notice to deceased, although Mr. Easty said he was to refer the matter to Stancliffe on his return to town.

After the death the amount of the note falling due on 24th December, and also the amount of the note that fell due on the preceding 9th of August, were tendered to the defendants, who refused to accept payment.

Mr. Hatton, a director, was examined. He stated he never knew of Stancliffe taking notes from Moffatt till after the death, and it was a surprise to the directors. He said he was the most active member, and the head office chiefly looked to him and Stancliffe, and if any one of the board knew of this it would be himself: that he never knew of credit being given in any case for premiums; it was contrary to their rules.

Stancliffe was examined at some length. He said that printed notices of premiums about to fall due were sent to Moffatt in the printed form produced. This form gave notice that the policy became void if the premium was not paid within thirty days, but might be revived within a year on satisfactory evidence of the good health, &c., of the assured, on payment of arrears, interest, and a fine. He said that, besides the letters, he had met Moffatt once or twice, and the latter had asked him to do the best he could for him. He said all the correspondence was made on his own authority and without the sanction of the board, who knew nothing about it: that when Easty, the cashier, on his return called his attention to the correspondence about the 9th of August, 1879, as to the non-payment of the note, he gave instructions for it to be written off in the policy register. "Again, it is cancelled in the September accounts of 1879." He also spoke of a memorandum made by him in the book, cancelling the policy. After so cancelling he did not write or give any notice to Moffatt. Easty's letter, he said, was the only intimation he had thereof. He said he did not think it necessary to send back the notes to him: that he had no intention of collecting them. The last note never was stamped. He stated that notice was sent to the head office that the company was not on the risk. He considered the whole transaction at an end when he cancelled. He was asked, "If the notes had been paid

before Moffatt died, would the board ever have known whether the money was paid or not?" He answered, "No; it would appear to the board as if the premiums were properly paid."

He stated that his accounts were laid before the board. He was asked if the board would have known that Moffatt's premiums had not been paid. He answered, not till the account of 1879; but they would know in 1879 that it was the premium for 1878: that the date was given: it was checked as a matter of course: that he had to discharge himself by shewing that the policy was written off or the money received. He said that in his returns to the head office in June, 1879, his accounts would shew that he had taken a premium a year over due, and if the Montreal directors had chosen to look at the returns they would have seen that.

He was much pressed as to his views in giving all this time to Moffatt, and admitted that he must have considered his insurance then still in force, though lapsed by strict rule: that if he had authority, he did thus keep it alive; that he did his best to keep it alive; and it was from what he had since heard that he had any doubt about his authority for doing what he did. As far as appeared in his evidence, the interest added to or included in the notes taken did not go the defendants. No entry of notes appeared in their books or accounts, but only the actual semi-annual payment, \$212.70.

Counsel for the defendants pressed for a nonsuit, on the substantial ground that the defendants were not bound by Stancliffe's unauthorized acts.

The jury, in answer to questions, found—

1. That the notes were taken by defendants' secretary as cash in payment of the premiums.

2. That he had authority to do what he did in accepting notes, instead of cash, in payment of premiums, and in extending the time for payment.

3. That the defendants, through their agent, waived payment of the premium on the dates for payment.

A verdict was entered for the plaintiff for \$9,883.

December 2, 1880. *McCarthy*, Q.C., obtained a rule *nisi* to enter a nonsuit, on the ground that there was no evidence of payment of the premiums due in May and November, 1878, or in May, 1879, and that the policy had therefore lapsed. 2. That there was no evidence of waiver. 3. That the secretary exceeded his authority in taking notes, and the company was not bound. 4. That after thirty days the policy could only be revived by the authority of the Board, and no application was made therefor. 5. That the notes were not taken in payment, and when default was made on the note in August, 1879, the policy lapsed. Or, for a new trial, the answers of the jury being contrary to law and evidence; and for misdirection in holding that there was evidence in support of the plaintiff's contention that there was evidence of payment. And to amend the second and fourth pleas, by stating therein the nonpayment of the premium due on 30th May, 1878.

December 2, 1880. *Robinson*, Q. C., and *Scott*, shewed cause. Stancliffe had the same authority as the general manager of a foreign company, and was therefore in the same position as the company itself: *Campbell v. National Ins. Co.*, 24 C. P. 144. Whether Stancliffe had authority was a question of fact for the jury. A company cannot forfeit for the nonpayment of the premium while they hold a note for a subsequent premium: *Watts v. Atlantic Mutual Ins. Co.*, 31 C. P. 55, 59. The condition in the policy as to revival does not prevent revival in other ways: *Supple v. Cann*, 9 U. C. L. J. 1.

The remaining cases cited are referred to in the judgment of Hagarty, C. J.

McCarthy, Q.C., contra. The distinction between this case and *Campbell v. The National Ins. Co.*, is, that here there is a board of directors. Stancliffe had no authority to waive the payment and the letters notify Moffatt of that fact. The second condition on the policy prevents its being revived in any way except by the directors.

He cited the following cases: *Bank of New South Wales v. Owston*, L. R. 4 App. 270, 283, 288, 289; *In re*

County Life Ass. Co., L. R. 5 Chy. 288; *Robinson v. International Life Ass. Society of London*, 1 Big. 601; *Busteed v. West of England Fire and Life Ins. Co.*, 5 Ir. Chy. 553; *Phoenix Ins. Co v. Sheridan*, 8 H. L. Ca. 745; *Pritchard v. The Merchants and Tradesman's Investment Life Ass. Co.* 3 C. B. N. S., 622; *Koelges v. Guardian Life Ass. Co.*, 1 Big. 621; *Robert v. New England Mutual Life Ins. Co.*, 1 Big. 634; *Markey v. Mutual Benefit Life Ins. Co.*, 103 Mass. 78; *Catoir v. American Life Ins. and Invest. Co.*, 1 Big. 51; *Wall v. Home Ins. Co.*, 8 Bosw. 597; *Bouton v. The American Life Ins. Co.*, 1 Big. 51.

February 19, 1881. HAGARTY, C. J.—It was argued that we should consider Stancliffe as the general manager in Canada for the defendants, in England, and that on the authorities a larger power should therefore be considered as vested in him. I think it fair to regard the defendants as a company in Montreal with a board of directors there, having as large a power for dealing with life assurance matters as a Canadian company there established, and to look upon Stancliffe as their secretary. We, of course, in this as in other cases of companies, have to look at the manner in which the business was managed, and the actual control and arrangement of the business shewn to be left to his disposition.

I think it is clear from the evidence that the practical conduct of all ordinary business, after a risk was accepted, was left in his hands, and he managed all matters connected with the receipt of premiums. The directors did not meet at fixed times, but as business required, and when called by the secretary.

Mr. Hatton, who appears to occupy a closer and more controlling influence than his co-directors, disclaims all knowledge of the dealings with Moffatt's premiums, and declares that until the claim was made on the dropping of the life, they were wholly unknown to the board.

A closer examination of the secretary's accounts must, I think, have clearly disclosed the fact that on this risk pre-

miums were in arrear, or at least that premiums were paid or received after the proper time had passed. The evidence, I think, also shews that accounts were duly rendered by the secretary to the head office, from which the like information could be gathered.

I find no reason whatever for believing that it was known to either board that promissory notes had been taken from Moffatt for any over due premiums, or any contract entered into for giving any specified time to him for their payment. As I understand the evidence, the notes were never entered in the company's books. They were not made payable to the company, and on their face merely import a personal dealing between maker and payee. Stancliffe is not even described as connected in any way with defendants.

Interest, or discount, as they call it, is included in the notes, but no interest seems to have ever been credited to the company. When money was paid on any of them, only the net payment provided by the policy was credited, as if paid at the proper time.

The case might have assumed a different aspect if it appeared that the defendants actually received interest on past due premiums, and a powerful argument in favour of their assenting to such extension of time would be given to the plaintiff.

When actual payment was accepted by the defendants' agent, with or without interest, after the policy had been in terms forfeited by default at the fixed periods, and the defendants had knowledge of such a course being pursued by their agent, it might be urged with cogent force that such acceptance kept the contract alive.

Their knowledge of such a practice ought to force them either at once promptly to forbid its repetition, or to acquiesce in its correctness.

If we had here to deal merely with a case of payments made and accepted after the proper time, our decision would not be involved in serious difficulty. It would come probably within the class of cases in which the well-known

Wing v. Harvey, 5 DeG. M. & G. 268, is a prominent authority.

We have to consider the much greater difficulty of holding that the agent here had the further power of creating a binding executory contract to extend the time fixed by the policy for payment.

The plaintiff has to maintain that when the life dropped on the 29th of October, 1879, there was a binding contract to extend the time for the May payment to the 24th of December; and had the directors on ascertaining the true state of the case, and the course pursued by their agent, say in August, 1879, when default was made in payment of the note, insisted on cancelling the risk unless all arrears were at once paid according to the policy, Moffatt could have insisted that he had a binding contract extending to 24th December; that they could not cancel, and they could only look to his dishonoured note for the payment due the preceding November.

It seems to me impossible to uphold this claim unless we hold that Stancliffe, on this evidence, could prospectively postpone the payment for six, nine, or any other number of months, and thus bind his company to a new contract.

To my mind the distinction is very plain between an agent accepting payment after the proper time, and making a binding executory contract to give further time.

The plaintiff's counsel cited cases in support of his contention chiefly or wholly American. *Mississippi Valley Life Ins. Co. v. Neyland*, 5 Big. 150, was a Kentucky decision. It was wholly in reference to the payment of the first premium, so as to create a binding contract. The Court says: "The weight of modern authority is, that a general agent of an insurance company, whose business is to solicit applications for insurances and receive the first premiums, has the right to waive the condition requiring payment in money, and to accept the promissory notes of the applicant or of a third party in lieu thereof, or to undertake to make the payment to the company himself,

and that when the cash payment is actually waived in either of these modes the contract binds the company, notwithstanding the recital in the policy that it is not to be binding until the cash portion of the first premium is actually paid in money." For this is cited *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Boehen v. Williamsburg City Ins. Co.*, 35 N. Y. 131; *Sheldon v. Connecticut Mutual Life Ins. Co.*, 25 Conn. 207. A local agent had caused the first difficulty, and the general agent, with full knowledge, made a settlement with the assured, who paid money, accepted another note, and obtained what was called a binding receipt and delivery of the policy.

In *Mutual Benefit Life Ins. Co. v. French*, 4 Big. 369, (in Connecticut,) the policy provided for the giving of notes in certain cases. A note, not of the kind mentioned in the policy, was afterwards given for an overdue premium, with a condition that if not paid at maturity the policy would be void. It was held that this payment was a condition subsequent, and could be waived by the company, who must demand payment in business hours on the last day of grace to avoid the policy. This case is cited in *Watts v. Atlantic Mutual Ins. Co.*, 31 C. P. 53. It was properly found on the evidence that the company had assented to or ratified all this.

Sheldon v. Connecticut Mutual Life Ins. Co., 1 Big. 27, is also a case as to payment of the first premium, so as to validate the policy which was delivered to the assured. The Court held that the agent who made the arrangement was a general agent, and had agreed to find the cash portion of the premium himself, and the assured should give his note at some convenient time, make his note payable to the company for one half and pay the other half to the agent, who agreed that if the application were accepted the insurance should take immediate effect. The application was accepted, the policy executed and sent to the agent, who signed it, but did not deliver it till the death of the assured, which happened in a few days. The defendants were held liable. The facts and findings of the jury should be referred to.

In *Dean v. Aetna Life Ins. Co.*, 4 Big. 341 (New York), the defendants' general agent in New York agreed with the assured to extend the time for payment of the annual premium from 20th September, the day when it was due, to the 5th November. On that day payment was tendered and refused. The life dropped on the 19th November. Evidence was given to shew the agent's general powers to act as he did (see page 344), and it was held he had the powers. The Court, at page 347, held "that the authority of the general agent, as such, to waive the condition of the policy requiring prepayment of the premiums, cannot be doubted, and that his acts thereto are binding on the company. Whatever his secret instructions may be, such is the established rule of law in this State."

Robinson v. International Life Ass. Society of London, 1 Big. 618, turned on the conduct of the defendants' agent in Richmond receiving Confederate money as cash during the civil war in payment of premiums. *Koelges v. Guardian Life Ins. Co.*, 1 Big. 621, does not touch our point. In *Robert v. New England Mutual Life Ins. Co.*, 1 Big. 634, non-payment of note given for half of first premium was held fatal, the assured dying shortly after it matured. *Catoir v. American Life Ins. and Trust Co.*, 1 Big. 336, is rather in favour of defendants' view. *Wall v. Home Ins. Co.*, 8 Bosworth, 597, is to the same effect. In *Insurance Co. v. Colt*, 20 Wall. 568, Supreme Court, U. S., it was held that an agreement by the general agent to give credit for the first premiums prior to the issuing of the policy, was binding. The Court say: "The credit allowed for the payment of the premium was an indulgence which the agents were authorized by general usage to give." They also point out the distinction between the initiatory arrangements for insurance preceding the execution of the formal instrument, and the requirements respecting executed contracts of insurance.

Even if we accept the American cases relied on by the plaintiff as binding authorities, they do not seem to me to come up to the facts of the case before us. Some of the

dicta as to the powers of insurance agents seem to my mind hardly to accord with my own ideas of English law, and I should hesitate before adopting them to their full extent. I need only point to such cases as *Acey v. Fernie*, 7 M. & W. 151, and *Busteed v. West of England Ins. Co.*, 5 Ir. Chy. 553, to shew a different doctrine as to such powers. But in most, if not in all the American cases, the evidence of authority is far stronger than in our case. A course of dealing has been shewn, known to the principals, and subsequently assented to or ratified by them, or the case of a general agent, representing in himself for some state or territory some distinct association. No attempt was made in this case to shew, either by general usage or assent of the principals, that Stancliffe had any authority to vary in any way the contract entered into with Moffatt. Nor can it be said that the latter had any good reason to suppose him to be clothed with any such power. He is told in the letter of the 2nd of November, 1878, that the giving him three months' time to pay the premium due the preceding May, was "against our rules, and I shall have to take the responsibility myself."

Then, on the 4th February, 1879, the May premium not fully paid, Stancliffe reminds him that the 30th of November premium was overdue. At that moment a complete default had been made in that November payment, and the thirty days had elapsed, and he is told "the directors are very particular regarding over due payments." There was again a complete default as to this payment, even in the extended time to the 9th of August, 1879.

It will be urged that, granted the power to take this note, its payment was then only a condition subsequent, and the note should have been duly presented, &c., at maturity, to create a forfeiture.

The last note, current at Moffatt's death, was taken within thirty days of the time for payment of the May premium.

As far as my judgment is concerned, I am willing to rest it on the result I have arrived at, that there is nothing in

the evidence to shew that Stancliffe had any power to bind the defendants or alter their express contract, by taking that note or extending the time of payment until its maturity. If he had such power, he could wholly alter the contract and postpone every payment six, twelve, eighteen months, or to any period he pleased.

Where is such a power to end? From what state of things can it be reasonably supposed to arise? Not, I think, from any reasonable inference as to the powers of an officer in his position. Could it be inferred from anything done, written, or said by his principals, or from any knowledge shewn to have been possessed by them of his conduct or method of managing their business?

I can easily understand their impliedly allowing their agent to receive payments after they were due; but I cannot suppose or infer from anything proved in evidence that it could be reasonably inferred that they authorized him to tie their hands, as it were, and bind them to wait any length of time he chose to name for moneys due to them; in other words, to bind them to a wholly different contract from that they had formally entered into.

Then it was argued that taking a note operates as payment, and payment must be considered as then made. It is clear on the correspondence that neither party thought of considering any of the notes as payment. I am obliged to look upon them as mere private arrangements between the secretary and Moffatt, in the words of the letter, against the rules and on his own responsibility.

The form of the notes, in no way appearing to be for or in favour of the company, and the apparent retention of the interest, I think, strongly favour the conclusion that it was wholly an unauthorized dealing on the secretary's part.

The final close of the correspondence by the cashier's letter, after the non-payment of the 9th of August, notifying him that "the society was off the risk," ought to have fully awakened Moffatt to a sense of his true position. It was clear notice to him of his danger and of the view taken by the defendants of their rights.

If the plaintiff can recover in this action, it must, as I have already stated, be on the assumption that there was then a valid extension of the contract of insurance to December 24th, and that as to the preceding November premium the society is remitted to its remedy by action on the note dishonoured on the 9th of August.

I am wholly unprepared to adopt these conclusions, and am forced to hold that, as far as I can understand the law of contract or principal and agent, the defendants are not responsible.

I wish to rest my decision on unmistakeable ground. I concede that there is evidence from which we may assume that Stancliffe, to the company's knowledge, was allowed to accept overdue premiums, and that the policy was by such acceptance admitted to be continuing; but I can see no shadow of evidence to warrant my holding that he had authority to bind his principals absolutely to wait for any named time, and thus to continue a liability after the dropping of the life.

I see the most marked distinction between the two things, accepting payment while the life was existing, and binding them to wait for a period extending, as it happened, beyond the duration of that life.

There is no suggestion that the plaintiff's case could be made any stronger on another trial, or that other evidence on either side could be produced.

I assume, in the absence of any suggestion to the contrary by the very able counsel for the plaintiff, that the question as to Stancliffe's authority, and as to the defendants' knowledge, acquiescence in, or ratification of his remarks, was properly submitted to the jury. It was presented to them in the most favourable view that the evidence would admit.

I think on that evidence the case fails, and that the rule must be absolute for nonsuit.

ARMOUR, J.—What we have to determine in this case is, whether as between Mr. Stancliffe and the insured, and as

against the defendant company, there was evidence upon which the jury could properly find that the acts of Mr. Stancliffe bound the defendant company.

It cannot be doubted, as was said in the *Montreal Assurance Co. v. McGillivray*, 13 Moore P. C., at page 121, that an agent may bind his principal by acts done within his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal, the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing.

Mr. Stancliffe was the secretary, resident in Canada, of the board of directors in England, was appointed by them, and communicated directly with them, and was the organ by which they communicated their will to all those transacting business with the defendant company in Canada, and his sayings and doings with respect to the business of the defendant company carried on in Canada are to be regarded in the same light, so far as the defendant company are concerned, as the sayings and doings of Mr. Butler, the secretary resident in England of the board of directors in England, with respect to the business of the defendant company carried on in England, would be.

He was also the general manager of the defendant company of all the business carried on by them in Canada, and would, according to the decision of the Court of Common Pleas, in *Campbell v. The National Ins. Co.*, 24 C. P. 133, and according to numerous decisions of the highest Courts in the United States, have, the board of directors being in England, the same general and ostensible authority to make arrangements for the payment and forbearance of payment of premiums payable in respect of policies effected in Canada, as the board itself would have.

It is true there was what was called a board of directors in Montreal, but they seem to have been naught else but agents of the board in England, and to have acted rather as the subordinates of Mr. Stancliffe than as his superiors, and were doubtless appointed more in order that their

names and position might be of advantage to the defendant company in effecting insurances in Canada, than for any functions it was necessary that they should perform.

A copy of every policy effected in Canada was sent to the office of the board of directors in England, where the whole of the accounts of the defendant company were kept, and Mr. Stancliffe made monthly returns to the board in England of the premiums received by him, so that any default made during any month, in the payment of any premium payable in that month in respect of any policy effected in Canada, would be made known to the board in England by the succeeding month's return.

The policy sued on was effected by the insured in the defendant company in 1871, and he had paid fourteen half-yearly premiums in respect of it, amounting in all to \$2,977.80, and the half-yearly premium payable in respect of it in May, 1878, having fallen in arrear, Mr. Stancliffe, as resident secretary, on October 24th, 1878, wrote to the insured, reminding him that his premium due last May had not been yet paid, and stating that if not paid at once the policy would be cancelled, "according to instructions received from our head office." In answer to this letter the insured wrote to Mr. Stancliffe on the 30th of October, 1878, asking him to discount his note at three months, and saying if that was satisfactory he could draw upon him, adding the interest; in answer to which Mr. Stancliffe, as resident secretary, on the 2nd of November, 1878, wrote to the insured as follows: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early."

But for the words in this letter, "Although it is against our rules, I shall have to take the responsibility myself," I do not think that there would be any room for the contention that Mr. Stancliffe was not acting within his general and ostensible authority in granting the forbearance at interest for the payment of overdue premiums which he

did grant, and in taking bills and notes therefor, particularly when we find the board of directors in England, as the insured would be led to believe by the letter of the 24th of October, pressing for payment of the premium overdue from May, 1878, and threatening to cancel the policy unless it were paid at once, and thereby giving the insured to understand that they were then, notwithstanding the default, still recognizing the policy as a valid and subsisting one. But it was insisted that these words were notice to the insured that Mr. Stancliffe, in granting the indulgence asked for by the insured, was exceeding his actual authority. I do not so read them. "I am sorry you require three months time, but I suppose it must be done, although it is against our rules;" that is, to give three months time was against their rules. This was no news to the insured. He was aware of it from the terms of his policy, but he was also given to understand by the letter of the 24th of October that the board of directors were themselves disregarding these rules in pressing him for the payment of a premium nearly five months overdue. "I shall have to take the responsibility myself" would not, in my opinion, give the insured to understand that Mr. Stancliffe had not, under the circumstances, authority to take the responsibility, and what occurred afterwards would convince the insured that Mr. Stancliffe had the authority to take it. The draft fell due and the insured was able to pay only \$140 on account of it, and Mr. Stancliffe took his note for the balance at three months, including interest. This note for \$82.62 fell due May 6th, 1879, and was paid by the insured, and the receipt for the premium, due May, 1878, was thereupon sent by Mr. Stancliffe to the insured.

Assuming, however, that Mr. Stancliffe either was not acting within his general and ostensible authority in granting to the insured forbearance at interest for the payment of premiums, and in taking bills and notes for them, or that so acting the letter of the 2nd November was notice to the insured that in so doing he was exceeding his actual authority, I think that the receipt by the board in

England, in June, 1879, of the premium which fell due in May, 1878, and of the interest paid by the defendant for the forbearance of it, was a ratification by the defendant company of the forbearance granted by Mr. Stancliffe in respect of the premium due in May, 1878, and an implied authority to him to adopt and exercise the like forbearance in respect of the subsequent premiums, more particularly when the board of directors in England must have known by Mr. Stancliffe's returns that at the time this premium was paid the premium due in November, 1878, was still unpaid. There was some suggestion made on the argument that Mr. Stancliffe did not account to the defendant company for the interest received by him from the insured on the premium due in May 1878, but I find no evidence whatever to warrant it, and in the absence of evidence to warrant the suggestion, I think the jury would properly infer that he did account for it to the defendant company.

My conclusion, therefore, is, that there was evidence upon which the jury were fully warranted in finding that the acts of Mr. Stancliffe bound the defendant company, and that he had their authority for such acts.

This being so, I think it clear that until default was made by the insured in the payment of the note given by him for the premium which fell due in May, 1879, it was not competent for the defendant company to relieve themselves from the policy, and that it was a valid and subsisting policy at the time of the death of the insured; that the plaintiff is entitled to retain her verdict, and that the rule should be discharged.

I should add that the taking of bills and notes was merely the form of the transaction, the granting of forbearance at interest being the substance, and the form of the bills and notes, or that they were unstamped, which could be remedied by double stamping, was wholly immaterial.

CAMERON, J.—The policy recites: “Whereas James Moffatt * * hath proposed to effect an assurance with the society upon the life of himself *for the whole duration thereof*, in the sum of \$10,000, and hath delivered, or caused to be delivered, into the office of the said society a proposal and declaration signed * * dated the 11th day of May, 1871, stating (amongst other things) that the said assured’s age next birthday will be forty-five years; which proposal and declaration, together with the statement made to the medical adviser of the society by the said assured, he hath agreed shall be the basis of the contract between him and the society; and whereas the directors of the society, relying upon the truth of such proposal, declaration, and statement, have undertaken the proposed assurance at the half-yearly premiums hereinafter mentioned; and whereas the said assured hath paid to the said society the sum of \$212.70 as the premium for the said assurance until the 30th day of November next.”

Then the policy proceeds: “These presents witness and declare that if the said assured shall die before or upon the 30th day of November, 1871, or in the event of his living beyond such day, then if he or his assigns shall on or before the 30th day of November and May in every year, during the continuance of this assurance, pay to the said society the like premium as before mentioned, then and in such case the funds of the society shall be liable to pay to Mrs. David Kennedy or Moffatt, his wife, whom failing, to the executors, administrators or assigns of the said assured, within three calendar months after proof, satisfactory to the directors of the society, shall have been given of the death of the assured having happened within the terms of this assurance, the sum of \$10,000, together with such further sum or sums, if any, as may have been apportioned as a bonus or bonuses to the policy, and become payable, with the sum hereby assured, and shall not have been satisfied by previous payment, or allowance or equivalent for the same. Provided always that these presents are granted upon and are subject to the several conditions hereon endorsed. * * ”

The following conditions, among others not important to be considered, were endorsed:—

“1. Thirty days are allowed for the payment of premiums beyond the day on which they become overdue. In the event of the life assured dying within the thirty days,

the sum assured will be paid after deducting the overdue premium.

"2. Lapsed policies may be revived within one year from the day when the premium became due, on proof being given satisfactory to the directors of the good health and regular habits of the person whose life was assured, and on payment of arrears of premium and interest thereon, together with a fine not exceeding twenty shillings per cent. of the amount assured."

Three and four relate to the territory within which the assured may go or reside, and 4 declares if the assured goes beyond the bounds, &c., the policy shall be void.

5. Provides: "If any fraudulent misrepresentation or wilfully false allegation shall have been made in the declaration or statement within referred to, then the policy shall be null and void."

"6. This policy will become void in the event of the death of the life assured by suicide, duelling, or the hands of justice, except as regards the actual legal or equitable interest of assignees; but if five premiums shall have been paid, the sum assured will be allowed to the legal representatives of the deceased without demur, and if less than five premiums have been received, then such premiums as have been received shall be refunded."

"7. The office value of the policy will be allowed on its surrender, unless cause be shewn to the contrary. This may be received: (1) By a cash payment. (2) By a policy for the full amount of the office value of the premiums paid and bonuses, if any, if such value shall reach £20, and which policy shall be entitled to share in future profits without further payment of premium. (3) By a deferred annuity, to be purchased with the cash value of the surrendered policy."

"N.B.—Policies upon which forborne premiums exist as a debt, must be released from such debt before a surrender value can be given."

"11. In the event of a policy becoming a claim before the full premium for the current year shall have been paid, the remaining half-yearly or quarterly payments will be deducted from the amount assured."

There is no express condition that if the premium is not paid the policy will be avoided; and as the risk assumed by the defendants was to pay the sum assured on the death

of the assured, when that might happen, it is only by reason of the payment of the premium being an implied condition precedent to the defendants' continued liability that a failure to pay would constitute a defence; and the question presented upon the pleadings and evidence for the determination of the Court is, was the acceptance by the resident secretary of the defendants in this country, of the promissory notes of the assured, dated the 7th of February, 1879, payable six months after date, for the premium due in November, 1878, and the note of the 21st of June, 1879, payable six months after date, for the premium due in May, 1879, in effect a payment of those premiums, or a giving of credit to the assured, or a waiver of the performance of the precedent conditions of payment sufficient to keep the policy alive, and prevent the forfeiture thereof.

The contract not being under seal, there would be no question, if the board of directors had accepted these notes, the policy would have been existing and valid at the death of the assured, unless the failure to pay the first note at maturity avoided it; so that the right of the plaintiff to recover in this action depends upon the solution of two questions arising out of the above general question: First, was the acceptance by Stancliffe, the defendants' resident secretary in Canada, of the notes in effect the same as if they had been directly received by the board of directors; and secondly, did the failure to pay the note for the premium due in November, 1878, at the maturity of such note in August, leave the parties in the position they would have occupied had the note not been taken by Stancliffe at all.

Upon the first question it appears to me the position of Stancliffe must be regarded as that of a general agent, with power to make any arrangement with respect to premiums, and their payment that the company itself could make, unless the assured had notice of a more limited and restricted authority; for the existence of the local board of directors, with the functions it performed, would not lessen the force of the acts of the resident secretary, who

would, from his position, appear to be the authorized channel of communication between the company and those dealing with it.

In *Campbell v. The National Ins. Co.*, 24 C. P. 133, Gwynne, J., in his judgment, at page 144, said: "The general agents of a foreign company doing business in this country must, I think, for the purposes of receiving premiums, be regarded in the same light as the company themselves; and we must, I think, hold that the payment made to such agents is the same as if made at the head office abroad, and that the knowledge and information brought home to the general agents at the head office in this country, must be regarded in the same light as if it was possessed by and brought home to the head office in the foreign country." This language is used in reference to a case where the premium was paid to a sub-agent after the time for payment of the premium had elapsed, and paid over by him to the general agent, upon a policy containing at the foot the following note: "Agents of the company are not authorized to make, alter, or discharge contracts, or waive forfeiture;" and at the foot of the printed receipts for premiums issued from the head office in the foreign country was the following notice: "Agents cannot make binding, or continue any policy, nor can they make, alter, or discharge contracts, or waive forfeiture, or bind the company in any way." Across the receipt, in red ink, was the following: "This payment, if made when overdue, will not be treated as continuing the policy unless the insured is in good health at the time."

The insured at the time of payment of the premium was suffering from a wound in the wrist, not then thought dangerous by his medical attendant, or by the sub-agent of the company, who saw the wound, but of which the assured shortly afterwards died.

The learned Chief Justice of this Court, then presiding in the Common Pleas, said: "The declaration admits the non-payment on the proper day, and avers that afterwards the defendants waived the default, and accepted the pay-

ment during the life of Campbell (the insured). The traverse is, that they did not waive the default and accept payment as alleged. I have already stated that as it was not denied that it was the practice in certain cases to accept payment after the day named, and within the thirty days, we are relieved from any difficulty as to the authority of the agents to waive a forfeiture."

From this language it does not appear that the learned Chief Justice based his judgment upon the ground that the act of a general agent in this country must be regarded as the act of the company, and that such agent is competent to do what the company itself could with respect to premiums, and the manner of their payment; but on the ground that by the practice of receiving premiums after the appointed day, and "from the memorandum printed in red ink across the receipt, shewing clearly that a payment after the prescribed day was contemplated."

In *Robinson v. The International Life Assurance Society of London*, 1 Big. 601, it was held that the general agents in New York of the defendants, an English corporation, had power to appoint sub-agents, and that such sub-agents could receive payment of premiums in the currency of the country where paid, though such currency was in fact worthless outside of the country where paid, and at the place where the general agents resided—a decision that goes further than it is necessary to go in this case to sustain the verdict for the plaintiff.

In *The Montreal Ins. Co. v. McGillivray*, 13 Moore P. C. 124, it was stated by Sir John Coleridge, in giving judgment * * "Murray was indeed their (defendants') general agent, and had he merely made an unwise contract for them, or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these and many other supposable cases (collusion on the part of the person seeking to be insured being out of the question) the company would have been clearly bound; in all such supposed cases he would have been acting within the scope of the authority which the company held him out as pos-

sessing." But in that case no policy had been issued, and as the charter of the company shewed it could not be bound unless by a policy issued after payment of the premium, of which the assured had notice, as the company's powers were disclosed by their Act of Incorporation, it was held the company were not liable.

From these cases, however, the general principle is deducible, that an agent may bind his principals while acting within the apparent scope of his authority, though in fact in excess of it owing to the restrictions or limitations contained in his private instructions.

The only instructions to Stancliffe, the agent, in this case, in evidence relating to the payment of premiums, are those in clause six of the minutes of the board of directors, establishing the head office in Canada, whereby it is provided that "no policy shall be signed or countersigned until the particulars are fully filled in, and shall not be issued from the office until the premium has been paid;" and a letter from the head office in London to Stancliffe, the resident secretary, of date 24th of August, 1878, in which the following passage occurs in reference to a particular policy: "The policy is dated the 29th of November, 1878, and a half year's premium is thereon acknowledged to have been received for the period ending 29th November. Afterwards an endorsement has been made altering the renewal dates to the 11th of July and 11th of January. If this means that the premium was not actually paid until the 11th of July, the policy is incorrect: a renewal date must not be altered in an arbitrary way, and without proper consideration expressed. It would seem that this is another instance of a policy being written, if not issued, before the premium is paid, and if so, it is an example of the danger of such a course being adopted. We must again request that the rule be strictly observed not to issue a policy from the Montreal office until the proposer has paid the premium. *His bill or promissory note for the amount must not be accepted in lieu of the cash. We decline to recognize such a payment here, and the regulation is a most necessary one.*"

It is clear neither of these paragraphs directly applies to the payment of premiums after the policy has been issued. There appear to be no instructions relative to such premiums; and while the general principle must be conceded that an agent empowered to receive payment cannot accept, so as to bind his principal, goods or property as such payment, it does not follow that a general agent may not give time or credit for the payment of premiums by the acceptance of a promissory note or otherwise, if he can, as in *Campbell v. The National Ins. Co.*, accept a payment after the time expired for payment has elapsed, and thereby bind the company. *Campbell v. The National Ins. Co.* is not reconcilable with *Acey v. Fernie*, 7 M. & W. 151, but it is an authority, as far as applicable in its circumstances to the present case, more in accordance with natural justice, and I follow it on that account.

I think, then, that upon the question whether Stancliffe's acts, from his position, would be binding upon the defendants in respect of persons having no knowledge of a limitation of his authority, that they would bind the defendants; and this brings me to the consideration whether upon the evidence it appears there was a restriction of his authority, so as to prevent him validly giving credit or time to the assured, known to the latter. Upon that point the only evidence appears to be contained in the following documents; first, a letter written by Stancliffe to the assured, dated the 2nd of November, 1878, in answer to one from the assured, asking for three months' credit, in which he says:—

“Your favour to hand. I am sorry you require three months time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early. There will be another premium due in December.”

This is not an intimation that the writer of the letter had not power to give the credit, but merely that it was against their rules to give credit for three months. It will

be observed that the premium, for the payment of which time had thus been asked, had already been overdue since the 30th of May, 1878, and the assured's request for the indulgence was evoked by a letter in Stancliffe's name from the Montreal office, dated the 24th of October, 1878, as follows :—

“I beg to remind you that your premium due last May has not been yet paid. *If not done at once the policy will be cancelled, according to instructions received from head office.*”

The payment of this premium was not made till May, 1879.

Second, in a memorandum at the foot of the notice sent to the assured, advising him of the premiums falling due, in these words :—

“A policy becomes void if the premium is not paid within thirty days after the date stipulated in the policy ; but it may be renewed within one year from the day when the premium became due, upon evidence satisfactory to the directors of the good health and regular habits of the person whose life was assured, and on payment of arrears of premium and interest, and a fine not exceeding one per cent. of the sum assured.

“N. B.—Remittances by *draft* or *bill* should be *payable on demand*, and free of charge at the place where the payments are due.”

These notifications, signed by Stancliffe, certainly do not shew any restriction or limitation of his own authority, and it appeared from the evidence, in addition to the letter of Stancliffe of the 24th October, 1878, that it must have been known at the head office in London that the payment of the May premium of 1878 was not fully paid till May, 1879, which, coupled with the condition of the policy above set out, that “Policies upon which forborne premiums exist as a debt must be released from such debt before a surrender value can be given,” would, without an explanation shewing that this last provision has no reference to such a policy as the one in question, lead to the conclusion that credit was sometimes given for premiums.

It may be that this provision has relation only to some special kind of insurance, as in some companies the half credit system; but there is nothing in the policy itself or in the letters to the assured that would give any such information, and the policy, being the writing of the defendants, must be taken most strongly against them.

I am of opinion, therefore, that the assured had not notice of any want of authority on the part of Stancliffe, if he had not such authority in law or fact, to give time or credit for payment of premiums.

There still remains the further question, did non-payment of the note falling due in August 1879, determine the policy? I think it did not. If the assured had covenanted or undertaken in the policy itself to pay the premium for which time was given and a note taken, on non-payment of the note the original cause of the action or obligation would revive; but the defendants having accepted a further note for a subsequent premium, which note was current and not matured at the death of the assured, the defendants must be taken to be, if I am right in the conclusion, that the acceptance of such note was within the scope of the agent's authority, in the same position as they would have been if they had accepted payment in money of the premium secured by such current note.

The merits are, I think, with the plaintiff. By the terms of the sixth condition endorsed on the policy, it is provided, "If the assured come to his death by suicide, duelling, or the hands of justice, in other words, by his own wilful act, the policy shall be void; but if five premiums have been paid, the sum assured will be allowed to the legal representatives of the assured without demur." In the present case the assured had paid eight annual premiums, and did not terminate his own life; and, as a matter of justice, one would have supposed that a company which had made the above liberal provision in case of suicide, would not have questioned the plaintiff's right by reason of an indulgence, granted by the accredited agent upon the security of the

assured's promissory notes, which they had the power of deducting from the sum assured if they became liable to pay before such notes were paid.

They have the right, however, to dispute their liability on any legal ground, and I can only hope that I have taken the correct view of the respective rights of the parties, so as to prevent a very serious loss to the plaintiff. I need hardly say, as the learned Chief Justice takes a different view of the law, it is not without much doubt and hesitation that I find myself forced to the conclusion I have reached.

The extent of an agent's authority is a question of fact, and the jury in this case have found upon the evidence, which was properly submitted to them, that the agent Stancliffe had authority to accept notes and extend the time for payment of the premiums in the manner he did, and in my judgment their finding ought not to be disturbed.

I have not overlooked the fact, that when the note falling due in August matured, and the assured asked for further indulgence, the bookkeeper of the defendants in the Montreal office wrote to him to bear in mind that until the back premiums were paid the society was off the risk; but this, by reason of the currency of the second note, made no difference. Moreover, by the letter in which he so writes he shews that Stancliffe is the person who would determine whether the indulgence should be given or not, and his own want of authority to act in the matter; as he states, "As the resident secretary is at present out of town, and your two premiums, viz., November, 1878, and May, 1879, being so long overdue, *I shall have to refer the matter to him on his return,*" and I think it was the duty of Stancliffe, or the book-keeper, after the return of the former, to have notified the assured as to whether the indulgence asked for was granted or not; and as neither did so, the assured was justified in believing that his blank note enclosed in his letter asking indulgence had been accepted and filled up for one of the periods named in his letter, that is, two or three months, and the latter date had not been reached at the time of the assured's death.

As I view the effect of the second condition on the policy, even if the policy had lapsed the assured could compel the company to renew it at any time within the year after the last premium became due, on the terms in that condition set forth; and the defendants, if not bound by the act of their agent leading the assured to believe he was still insured, would prevent him from exercising this right, as also securing the surrender value of the policy, which are additional reasons why they should not be permitted to set up the want of authority in their agent to give the credit asked for. If an agent can, by accepting payment of the premiums at any time within the year, which would appear to be the effect of the decision in *Campbell v. The National Ins. Co.*, 24 C. P. 133, bind the company and keep the policy alive, it is virtually permitting the agent to give credit, and there does not seem to be very great danger to the principal's interests in permitting him to do that directly which he may do indirectly. He must always act reasonably, or the assured would be held to have notice of his want of authority through the act itself. For instance, if the agent took a note payable after the death of the assured for a premium made payable by the terms of the policy in six months, it would be manifest that he was entering upon a transaction that could not have been contemplated by the parties, and one that would deprive the company of the means of meeting their accruing obligations. This a very different thing from taking a note payable in six months, with interest added, for the amount of the overdue premium, which may fairly be assumed to be an act within the scope of the agent who does it, when no possible loss can accrue therefrom to the principal, as in the present case.

Rule discharged.

NEILL V. THE UNION MUTUAL LIFE INSURANCE COMPANY.

Life policy—Overdue premium—Payments—Waiver of forfeiture.

J. N. was insured with the defendants by a policy, dated 8th May, 1877, on which quarterly payments were due on the 10th days of February, May, August, and November, in each year. The policy, among others, contained the following conditions: "If any premium shall not be paid when due the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the President or Secretary." "If, for any reason, the premium is received after it becomes due, it is upon the express condition that the party is in good health, and of correct, sober, and temperate habits, otherwise the policy shall not be put in force, &c." "In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium."

McN., the general agent of the company at Toronto, was in the habit of receiving payment of premiums after they were due, of which the company were aware, and did not disapprove. On 24th September, 1879, a cheque was given by the assured's firm to McN., with the understanding that it was to be held till there were funds, as he had often done formerly. It was several times presented and dishonoured. On the 17th October, McN.'s successor in office notified the assured that if the cheque were not paid at once the receipt would be returned to the company. On the 21st October, in answer to S., the agent's messenger, the assured's partner said that there were funds for the cheque at the bank, but as it was nearly three o'clock S. said that he would wait till the morning. That evening the assured was killed, and the cheque was therefore not presented, but was retained by the company.

The plaintiff produced all the premium receipts except that of 10th August, 1879. The jury found that the defendants' agent had waived the payment of the premium due on the 10th August, by receiving the cheque, and found a verdict for the plaintiff.

Held, CAMERON, J., dissenting, that though the defendants appeared willing up to the 21st October to receive payment and keep up the policy, yet there was no waiver of the terms of payment, and no existing agreement or anything binding them to extend the time for payment and to remain liable, and that the cheque was not taken in payment.

Per CAMERON, J. The effect of the last above mentioned condition was to authorize the payment of premiums by cheque or note, and to thereby extend the time of payment; and the application by the defendants' agent on the 21st October for payment of the premium, and the retention of the cheque, was equivalent to accepting a new cheque, which (there being funds therefor) would be payment.

THE first count of the declaration was on a life-policy issued to the testator, dated the 8th of May, 1877, alleging that in consideration of \$73.26 paid, and of the payment of a like sum on or before the 10th days of May, August,

November, and February, in each year during the continuance of the policy, the defendants promised to pay the executors, &c., of John Neill \$5,000 ninety days after notice of death : averment of general performance, of death, &c., and of non-payment.

The second count set out the policy, admitting that the premium due on the 10th of August, 1879, was not paid as required by the policy, but alleging that it was paid by delivery to the defendants of a cheque for the amount thereof on the Imperial Bank, payable to the order of the defendants' agent at Toronto; and that the defendants accepted and retained the cheque in lieu of payment and in satisfaction of the premium, and thereby discharged the insured from payment of the said premium, and waived all right to forfeiture of the policy under the conditions thereof, and elected and determined to retain and continue it in force, and afterwards, while it remained in force, the insured died, &c.

The third count stated the non-payment, and that the defendants waived the default and duly extended the time for payment of the premium, and waived all right to forfeiture of the policy, and elected to retain and continue it in full force, and that Neill died while it was in force.

The third plea to the first count set out a condition in the policy as follows: "If any premium or instalment of a premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the president or secretary;" and averred default in payment of the premium due 10th of August, 1879, whereby the defendants were released from liability.

The fourth plea to the second count set out the same condition, and the following provision: "All premiums are due at the office of the company in the city of Augusta, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only

on the production of the company's receipt therefor signed by the president or secretary. No payment made to any person, except in exchange for such receipt, will be recognized by the company, or be deemed by either party as valid payment. If for any reason the premium is received after it becomes due, it is upon the express condition that the party is at the time of the receipt of such premium in good health and of correct and temperate habits; and if the fact is otherwise, the policy shall not be put in force by such receipt. And such receipt must in every case be understood by the parties as an act of courtesy on the company's part, and in no case whatever as constituting any objection on its part to waive the payment of a future premium when due. In case any note, cheque, or draft given towards the payment of any premium shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premiums when due. All premiums are payable annually in advance. When the premium is made payable in semi-annual or quarterly instalments, that part of the year's premium, if any, which remains unpaid at the maturity of the contract, shall be regarded as an indebtedness to the company on account of this contract, and shall be deducted from the amount of the claim; and if any such payment be not made on or before the day it is due, the company shall from that day be released from all liability under this contract," &c. Averment: that the premium which became due on the 10th of August, 1879, was not paid as required by the policy, nor in any other way, and that the defendants did not accept or retain said cheque in lieu of payment, as required by the contract, or in satisfaction of the premium, and did not discharge Neill from payment, &c., nor waive their right to forfeiture of the policy or elect to continue the same in force.

The fifth plea to the third count charged non-payment, and traversed the waiver of default and extension of time for payment, and election to continue the policy in force.

Issue.

The trial was at Toronto, before Morrison, J., and a jury, when a verdict was rendered for the plaintiff for \$4,870.

The defendants were an American company, James McNairn being their agent for Ontario and Manitoba, and having his place of business in Toronto, where the deceased lived. His deputation from the company was put in. He was appointed to solicit for insurance on blank applications furnished to him under their policies, and in accordance with their terms; to make manual delivery of policies, notices, premium receipts, and other papers sent to him for the purpose; to collect and account for all premiums or other moneys payable to the company, if permitted to be received by him, and to perform such other duties as might be required of him, &c.

He agreed to act within certain rules therein set forth. It was declared that he had no authority to make, alter, or discharge any contract, or waive any forfeiture, &c., nor receive any moneys due or to become due to the company, except on policies and renewal receipts (signed by an officer of the company), &c., * * and had no authority on behalf of said company to credit or remit premiums not actually or properly received in accordance with their contract and the instructions of the company; and it was expressly agreed that any moneys remitted, or advances, or remittances of money made by the agent for any person insured, should be deemed to be made on his personal and private account, and should in no way bind the company, unless the president in writing so directed.

The policy was produced, dated the 8th of May, 1877, and was as set out in the declaration. It was subject to the condition: "If any premium, or instalment of a premium on this policy, shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability; and the only evidence of payment shall be the receipt of the company, signed by the president or secretary." This requirement was also printed on the back of the policy.

For all the quarterly payments down to the 10th of May,

1879, the plaintiff produced receipts duly signed by defendants' secretary, as provided by the policy.

The last quarterly payment due before the death was on the 10th of August, 1879, for which there was no such receipt, and it never was in fact paid. The assured was accidentally killed on the evening of the 21st of October, 1879. The regular receipts for premiums falling due were furnished from the head office to the agents, and such a receipt was forwarded, and was in McNairn's hands on the 10th of August.

Each of these printed receipts, on its face, invited special attention to the back. On the back was printed this provision, that the agents could receive premiums only on the production of the company's receipt therefor, signed by the president or secretary.

It also provided that if a premium were received after it became due, it was on the express condition that the party assured was at the time of the receipt of the premium in good health, &c.; and that if the facts were otherwise, the policy should not be put in force by such receipt.

Deceased was a member of the firm of "J. Neill & Sons." Apparently these quarterly premiums were never paid exactly at the right time, and cheques were given at or after such times, and constantly held over and paid at last, and on one occasion a note at fifteen days was given.

Defendants' agent and clerk strongly denied that the regular receipt was ever given to the assured till a cheque was given. The partner and son of the deceased said that the receipt was sent to them generally before cheques were given for the premium due. He said the cheques were always given with the understanding that funds were not there to meet them, and the agent was to hold them until such time as the money was there; they were given so that he would have something in his hands.

It was clear from the evidence that McNairn had constantly received premiums after the time fixed for payment. He said that when he gave up the renewal receipt to the assured it became a personal matter between them, and he

had to pay the company: that it was on account of previous delays, and on account of his leaving the agency, he could not undertake the responsibility himself in the case of this last premium, and so he kept the receipt until it should be paid.

The last quarterly premium was due on the 10th of August, 1879, and nothing seemed to have been done about paying it until the 24th of September; in fact, the payment due in May, 1879, was not paid until August.

On the 24th September, 1879, a cheque was given by "J. Neill & Son," on the Imperial Bank, Toronto, "Pay to J. A. McNairn, Esq., or order, \$73.26." The son said he gave it to the agent, and the understanding was that there were no funds to meet it.

McNairn said: "Neill wanted it held till 1st October. I was anxious to get it before the 1st, when my report went away. I was very anxious that my report going in on the 1st should include this. I said I would, at all events, hold it until the 28th or 29th of September, and I said to him, 'You must try and have funds at that time.'"

He held it till the time mentioned, and it was then presented at the bank and refused, and this was done several times, and application made also to Neill, but always without success.

McNairn, on the 8th October, resigned the agency to Messrs. McCabe & Co.

On the 17th October, McCabe & Co., wrote to Neill: "Among the papers passed to us by our predecessor we find a cheque of yours, dated September 24th, with renewal receipt attached. We regret that we shall have to return the receipt to the company unless the cheque is paid without delay. We have sent to you several times, and under the rules of the company the receipt must be returned unless adjusted without further delay."

This was received by Neill.

On the afternoon of 21st October, a clerk of the agent, Mr. Smith, went to the deceased's office with the cheque to try to get the cash. He saw the son. According to the

statement of the son, he told Smith that there were then funds at the bank to pay it, and he could go and get payment. It was five minutes to three. He asked Smith would there be time to get to the bank in time. He said he thought not, and would leave it till morning and go at ten a.m., and said he was glad that it was settled. It appeared there was money that afternoon, between half-past two and three p.m., enough in the bank to pay it if then presented, as also on the following morning after the death. That evening the assured was killed, and the cheque, in consequence, was not presented and remained in defendants' hands.

Smith's evidence differed from Neill's. He swore he went in the morning of the 21st, and was asked to call again. He called again in the afternoon, when the son told him if he would go to the bank the next morning there would be funds, and the cheque would be paid. The day after the death, the 22nd October, McNairn wrote to the defendants that McCabe & Co., had returned to him a cheque given by John Neill in payment of premium, which was unpaid; that they had no doubt advised them of his death, and adding, "will you please let me know if you wish me to return the cheque to Neill's representatives, send it in to you, or retain it myself until the question is disposed of."

On the same day McCabe & Co. wrote to the defendants that "among the papers handed to us by our predecessor and your Mr. Burns, was the enclosed renewal receipt, dated, August 10th, 1879, and a cheque, as per copy herewith attached. This cheque has been presented for payment several times." (Then the death was mentioned.) "His son has just called to say that he had placed funds in the bank to provide for the cheque. We said to him that we were now writing you advising you of the circumstances, and that we must act under your instructions. We have enclosed the cheques to Mr. McNairn, as per copy letter herewith."

On the 24th October, the defendants wrote to McNairn :

"Yours of the 22nd. We wired you to forward the John Neill cheque to the office for the reason that we may need it on file as evidence. It is possible the party may claim the premium was paid, and we want to shew the cheque as evidence that it had never been provided for. Of course we cannot accept the payment of the cheque after the death of the insured. You will also please advise us of the full particulars; how the cheque came to be taken, the date when presented to the bank, and if more than once give the different dates, and whether anything was said during Mr. Neill's lifetime about meeting the cheque. Let us have full particulars for record."

On the 27th October McNairn wrote to the defendants: "I sent you John Neill & Son's cheque on Saturday. It was given in settlement of premium on the 24th September, and asked to be held for a few days, until after the close of the month. I agreed to hold the cheque until Monday the 28th, and I think it was presented on that day; at all events we had sent two or three times for it prior to my leaving, and on the transfer it was handed over to McCabe & Co., attached to the renewal receipt."

He wrote again on the 1st November: "My book-keeper, Mr. Smith, presented this at the bank the Saturday before my transference of the agency on the 14th October, and the reply was, no funds; but while he was still at the wicket Mr. Neill presented another cheque from his firm, which was marked—probably an arrangement with the manager—for payment of wages. On the 6th, the Monday after, Mr. Smith took the cheque to Neill's office, and payment was positively promised a few days later. I then turned it over to McCabe & Co. as cash. Previous to the above-mentioned presentation to the bank it had been offered, I think, on the day I undertook to hold it to, *i. e.*, the 28th September, and I also sent down to the firm, but of the dates I cannot be quite sure, although Mr. Smith can say positively that presentation had been made at both places during the week prior to the 4th. The whole matter is, I think, perfectly clear and

simple. They never got the receipt and never paid the premium, although the intention was perhaps all right, and it cannot be charged that we did not use all due diligence to get the cheque cashed. Have you taken advice as to what effect your holding of the cheque will have?"

McNairn stated it was usual in paying for premiums, where cheques were given in payment, for the receipts to be given up, but this one he held till the cheque should be paid. In his monthly return for August he stated this amount, \$73.26, being the premium due on the 10th of August, under the head of "on hand uncollected." He said that there were always a number of premiums unpaid standing. When he handed over the agency to McCabe, about the 8th of October, he deducted his commission on this premium, probably as likely to be paid, with the understanding that it would be refunded if not paid.

It was also in evidence that when a payment was made after due, a certificate from the party that he was in good health was required, and Smith, when he called for payment, had such certificate with him to be signed.

It was objected for the defendants that the plaintiff could not recover: that the premium had never been paid, and that the express contract was that they would take no evidence of payment except the receipt stipulated for.

After much discussion, and an application by the plaintiff to add a count admitting the non-payment, but that the defendants did not avoid or cancel, and that they chose to keep it in force, the learned Judge submitted this question to the jury, "Was the payment of the premium due on the 10th of August waived by the acts of the defendants' agent receiving the cheque of the 24th of September; and although such cheque was not paid, still did the payment of the premium continue waived until after the death of the insured?"

The jury stated that they found the question of waiver in favour of the plaintiff, as also the other question, stating, "We place more reliance on the evidence of the Neills than of the defendants."

Counsel for the plaintiff objected to the form of the question, and urged that the jury should be asked on the whole evidence whether there was a waiver, and the question should not be confined to whether or not there was a waiver by reason of the receipt of the cheque on the 24th of September.

A verdict was entered for the plaintiff.

November 15, 1880. *Robinson*, Q. C., obtained a rule to enter a verdict for the defendants or a nonsuit, the policy not being in force at the death of the insured, by reason of the non-payment of the premium: and there being no evidence of waiver so as to continue the policy; or for a new trial for misdirection, in leaving the question of waiver to the jury, and in entering a verdict for the plaintiff on the answers of the jury, and for not directing that there was no evidence of any binding waiver; and on the law, evidence, and weight of evidence.

November 29, 1881. *T. Ferguson*, Q. C., and *G. H. Watson* shewed cause. McNairn was the general agent of the company in Ontario, and as such had power to waive any condition in the policy. His powers in that respect are co-ordinate with those of the company: *Campbell v. National Ins. Co.*, 24 C. P. 133; *Wood v. Poughkeepsie*, 32 N. Y. 619; *Miller v. Life Assurance Co.*, 12 Wallace U. S. Sup. Ct. 285. In *Mason v. Hartford Fire Ins. Co.*, 37 U. C. R. 437, Wilson, J., said it should have been left to the jury to say whether or not the agent had authority to waive conditions in the policy. This was done in this case, and the finding of the jury should not be disturbed. The evidence shewed that cheques had continually been given by the assured and his firm for the premiums on the policy as they fell due from time to time, and a number of these had been dishonoured. The course of dealing between the assured and the company was such as to allure the assured into a belief that the policy was still in force, and the taking of the cheque for the premium by the general agent was a distinct waiver

of the condition requiring payment of the premium at the time specified in the policy. There had been funds in the bank on the day of the death of John Neill, the assured, sufficient to cover the amount of the premium, and from the evidence it appeared that the defendants' agent was aware of this. The contract of assurance was not avoided by the non-payment in cash of the premium under the circumstances, and the communications between the company's general agent and the assured shewed that the company regarded the policy as still in force. The cheque was a payment of the premium. The defendants were placed in this position of advantage as respects the assured, that they could enforce, by action on the cheque, payment of the overdue premium, which they could not have enforced if Neill had declined to pay the cheque and allowed the policy to drop. The company should have given notice that they considered the policy avoided by the non-payment of the premium, and cancelled the same accordingly. This was not done, and the policy of insurance was a subsisting contract at the time of Neill's death. They cited *Boehm v. Williamsburg Ins. Co.*, 35 N. Y. 131; *New York Ins. Co. v. National Ins. Co.*, 20 Barb. 468; *Goit v. National Ins. Co.*, 25 Barb. 189; *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Johnson v. Provincial Ins. Co.*, 26 C. P. 113; *Watts v. Atlantic Mutual Ass. Co.*, 31 C. P. 53; *Carroll v. Charter Ins. Co.*, 1 Abbott 318; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Washoe v. Hibernia Ins. Co.*, 7 Hun 74; *Taylor v. Merchants' Ins. Co.*, 9 Howard U. S. Sup. Ct. 390; *Wood on Insurance*, pp. 65, 71, 862.

Robinson, Q. C., contra. The non-payment of the premium avoided the policy. The defendants did not agree to receive the cheque in payment of the premium, and the moment the cheque went into default, that moment the defendants were remitted to their original rights, which was to forfeit the policy in accordance with its conditions. A cheque is not payment if dishonoured. The general agent had no authority to waive the conditions of the

policy. This could be done only by the company at its head office. The limitation of the agent's authority was distinctly stated in the policy and made part of the contract, and is again printed and called to the attention of the insured on each receipt.

He cited the following cases: *Catoir v. American Life Ins. Co.*, 1 Big. 337; *Acey v. Fernie*, 7 M. & W. 151; *Simpson v. Accidental Death Ins. Co.*, 2 C. B. N. S. 257; *Hughes v. Canada Permanent Society*, 39 U. C. R. 229; *Bliss*, 488, 495, 496, 497.

February 19, 1881. HAGARTY, C. J.—In the view I take of the case, I may assume in favour of the plaintiff that McNairn was the general agent, and as such clothed with the powers of a general manager.

I think it was clearly established in evidence that he was in the habit of receiving payment of premiums after they were due. I also assume, in this case, that had the money been paid at any time before the dropping of the life, it would have been accepted and the policy kept in force.

It seems clear to me that after the time for which he agreed to hold the cheque of the 24th of September, *i. e.* to the 28th of September or to the 1st of October, there was no existing agreement of any kind by which he had agreed or was bound to extend the time. From that to the day of the death payment was being constantly pressed for.

The defendants had done their duty by the cheque. They regularly presented it, and in every way strove to make it available.

It has not been found by the jury, nor was it seriously pressed, that the taking of this cheque was in itself payment. A person can of course agree to accept a cheque on a bank, or an order on any third party, as payment and satisfaction. He is then remitted solely to his remedy on the cheque or order.

I see nothing in the evidence to warrant any such agree-

ment on defendants' part. A cheque, "if it be duly presented and dishonoured, is no payment or satisfaction, there being no satisfaction unless satisfaction is provided by it in fact; yet it becomes given and taken, accepted and retained in satisfaction, if it be so dealt with as to enable the giver of it to say, 'you have not dealt with it as if I had an interest in it, but as if you were to deal with it at your pleasure, and by your mode of dealing with it you have caused me to sustain an injury'": Per Bramwell, B. in *Hopkins v. Ware*, L. R. 4 Ex. 270. See also in this Court, *Hughes v. Canada Permanent Society*, 39 U. C. R. 229, and the authorities there cited. "It operates as payment until it has been presented and refused:" Per Patteson, J., in *Pearce v. Davis*, 1 Moo. & R. 365. See also *Currie v. Misa*, L. R. 10 Ex. 164, in Appeal; *Daniels* on Negotiable Instruments, vol. II., 577; *Byles* on Bills, 24. But it is suggested that by receipt of this cheque the defendants acquired a right against Neill which they would not otherwise have had, viz., that they could compel, by action thereon, payment of this overdue premium, which, if Neill had simply declined to pay, and allowed the risk to drop, they could not have enforced.

I hardly see the force of this. It was not given or taken with any such view, or for such object. It was used simply as a means of getting the money: it failed to meet that purpose, and became useless: the defendants, so far from claiming any right thereunder, repudiate it by their defence. It cannot, I think, be regarded differently from an "I. O. U.," or promise to pay on demand. Had Neill given such a document, I consider that after demand and default of payment, the parties would stand just as before.

As I understand it, the main contention of the plaintiff is, that on the evidence the policy down to and at the time of death, was treated by defendants as in force and unforfeited.

It is chiefly on American decisions that their case is rested. I have a strong opinion that views and expressions

may be found in many of these cases that can hardly be supported by authorities binding on us. No case, however, reasonably near the present in its facts, has been cited.

In *The Washoe Tool Co. v. The Hibernia Fire Ins. Co.*, 7 Hun N. Y. 74, it was held that where a fire policy has been delivered without exacting payment of the premium, it is a waiver of the condition that the company will not be liable till the premium is paid, the delivery importing a credit being given, no time being specified. It was said that perhaps on failure to pay, after lapse of reasonable time, the defendants might elect to rescind the contract. Repeated demands of the money, with notice that unless paid the company would have to cancel, did not amount to actual rescission, but rather to an admission that the policy continued in force, and would so remain until an actual cancellation. This is a decision of Talcott, J., Supreme Court, N. Y. It was on an appeal from a referee, who found that the policy had never been terminated, cancelled, or annulled, but was in full force at the date of fire.

In *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. N. Y. 468, there was a condition that no insurance was binding until actual payment of premium. The money was in a bank to the credit of the assured, where the agent usually deposited. The cashier told the agent at the time when the arrangement for insurance was made, that he could have the money. The agent directed him to let it lie, and when he wanted it he would draw for it. It was in fact not drawn till after the fire. Held, the agent had waived a strict compliance with the condition, and that he had authority to do so.

In *Taylor v. Merchants' Ins. Co.*, 9 Howard Sup. Ct. 390, a fire assurance case, the head note is: "The agent of the company having instructed the applicant to 'send him his cheque for the premium, and the business was done,' the transmission of the cheque by mail was a sufficient payment of the premium within the terms of the policy." The letter with cheque is dated the 21st of December, in Alabama, but it was not received in Virginia till the 31st

of December. On the 22nd of December the fire occurred. The insured had funds in the bank to meet the cheque. The Court held that the transmission by mail was the same as if the cheque had been received directly. They point out that no mode of payment was prescribed, and the agent was at liberty to exercise a discretion in the matter.

I have noticed the cases apparently mostly in favour of the plaintiff's argument.

The law is very fully considered in *Bliss*, p. 488. Sec. 300 considers the question as to the effect of the agent giving up the renewal receipt, and it is stated that if the renewal receipt provides that if made when overdue it will not be valid unless the assured be in good health at the time, the act of the agent in delivering it is without effect: p. 493, secs. 297, 305, 306.

On the subject of taking notes, sec. 182 (p. 284, *et seq.*), at p. 287, the effect of conditions is discussed. The Court, in one of the cases cited, says: "As a general rule a condition in a policy not complied with defeats it, and no act is required on the part of the company. I have found no authority which establishes an exception in the case of a condition as to the non-payment of a premium note." Sec. 184, p. 290, discusses the necessity for returning a note not paid: see also sec. 185. In the case there cited it was held it was unnecessary to return the note. It was said that the company would of course be bound to return notes when requested, "and in this case they have returned them by surrendering them up at the trial."

I do not attempt to reconcile all the *dicta* that I have met with on this subject. I have read all that has been relied on by the plaintiff's counsel, and have no doubt that their learning and industry have omitted nothing.

I do not consider that any tender of the money or existence of funds at the bank on the morning of the 22nd, after the death, can have any effect.

By the dropping of the life the position of the parties is totally changed, and there would be no consideration or mutuality; nor could the usual certificate of health

required, on payment of an overdue premium, be obtainable. Smith, a clerk in the agent's office, said he would have given the renewal receipt if the money had been paid and the health certificate given.

In *Edge v. Duke*, 18 L. J. Chy. 183, the question of waiver of non-payment is discussed. The head note is : "A loan was granted by an insurance company upon a bond with sureties, and a policy on the life of the borrower as a collateral security. The premiums were not paid within the days of grace, but were demanded by the company, who brought actions against the sureties of the bond ; they refused to pay and pleaded *non est factum* and payment. On a suit instituted to restrain such actions, and it being contended that the demand by the company after the policy "was actually void," had revived it, *Held*, that such revival was neutralized by the fact of refusal to pay, and the bill was dismissed with costs."

The bill prayed that the policy might be considered as still valid, and that the lapse was waived. Bethel and Malins, for the plaintiff, contended that by suing for the premium after the lapse the company had treated the policy as existing : that they had treated it as a debt. The Vice Chancellor (Shadwell,) said if they had paid when requested, it would have been different ; but though there was a demand for the premium, that demand was annihilated by the refusal to pay. Nothing is shewn to make it appear that anything could be recovered on the policy.

In the case of *Simpson v. Accidental Death Ins. Co.*, 2 C. B. N. S. 257, and Bliss, sec. 195 p. 311, it was held that where the death occurred within the period of grace, twenty-one days, the executors had no right to pay the premium after the death had occurred.

Pritchard v. Merchants' Assurance Co., 3 C. B. N. S. 622, is to the same effect. Thirty days were allowed. On the last of these days the assured died ; next day the plaintiff, for whose benefit the policy was effected, sent a cheque for the premium, and the company the day

after collected the cheque, and gave a receipt as for premium due up to the proper day for payment. Both parties were then ignorant of the death.

It was held that the policy was not revived, and the contract being for the payment of the sum insured on the future event of the death, a payment within the thirty days, but after the death, was not a payment within the condition of the policy; and that there was an implied understanding when the premium was received that the assured was then alive.

Want v. Blunt, 12 East 183, is in the same direction.

This latter case indicates the view of the Courts, that in these contracts the strict rules of construction applicable to real estate do not apply: that the plain meaning of the words used in the contract must be adhered to and followed, and performance on the doctrine of *cy pres* is not sufficient.

The case, of course, turns on the position of the parties when the death occurred. Payment had not been made. Did the company still remain liable? As already intimated, I think that the defendants were always, up to that time, willing to receive payment, and would have given the regular receipt and kept up the policy. I am wholly unable to construe the existence of that willingness into a contract to wait any further time, and to remain liable even if the life dropped before payment. The moment the death occurred the whole position was altered, and the whole consideration for defendants allowing further time or waiving their rights had failed. When the last request for payment was made in the afternoon of the 21st October nothing occurred, in my judgment, even on the plaintiff's evidence, shewing anything amounting to payment or agreement to give further credit. It all seems to amount to this: if the defendants would then go to the bank they could get the money. Is that payment or its equivalent? By taking the cheque the defendants may have bound themselves to try and make it available, and they did so several times in vain. All that we can hold that the agent did, was to say that, as it was then too close to three

o'clock to reach the bank, he would try again, or go next morning.

Then the life drops, the money still unpaid. I think he was not bound then to go or to receive payment from any quarter. The whole burden of making payment was on the assured, and not on the defendants.

All the risk of delaying payment from day to day was his risk. He was, as it were, staking the continuance of his life against the continuance of his insurance. He delayed a day too late.

However anxious we may be to prevent an important provision for a family from being unintentionally lost, I do not see what right I have to refuse to defendants an enforcement of the very plain and intelligible conditions on which, and on which alone they entered into this contract.

I think the deceased was fully aware of his position with the company, and of the risk he ran in protracted delays. Ample notice was given to him, and every reasonable indulgence allowed, and repeated attempts made to obtain payment.

I cannot hold that the making of these attempts had the legal effect of binding the defendants to continue to make them, or to remain bound when death happened before any of the attempts had been successful.

ARMOUR, J., concurred.

CAMERON, J.—I am of opinion the effect of the contract of insurance made by the defendants, reading the conditions endorsed as if incorporated in the body of the policy, as the express provision of the policy in that respect permits, is to authorize the payment of premiums by note, cheque, or draft; and that by such note, cheque, or draft the time for payment may be extended beyond the day fixed for the payment of the premium by the terms of the policy.

The language of the condition which leads me to this

conclusion is as follows: "In case any note, cheque, or draft given towards the payment of any premium shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium when due."

This provision being on the policy, the assured had a right to assume that an agent taking or accepting a cheque, note or draft, was fully authorized by the company so to do; and as the forfeiture worked by non-payment of the premium would also take place at the maturity of the note, cheque, or draft, the reasonable intendment is that such maturity would be at a period subsequent to the falling due of the premium.

The jury, by their finding, in express terms gave credit to the account given by the plaintiff's witnesses of the manner in which the cheque was given. From that account it appears, to the knowledge of the defendants' general agent, McNairn, when he accepted the cheque, there were no funds at the credit of the drawers to meet it; but that, according to the practice that had prevailed in the dealings between the assured and such general agent, the cheque was held till funds were provided, or the cheque was otherwise met than through the bank: that on the 21st of October, the day on which the assured was killed, and before he was killed, the messenger of the general agent called upon the drawers of the cheque, and was then informed by one of the firm, a son of the assured, that there were funds, and the cheque would be paid.

The evidence, both on the part of the plaintiff and the defendants, shewed as a matter of fact there were funds on the afternoon of the said 21st of October applicable to the cheque at the credit of the drawers in the bank. The messenger who called upon the drawers of the cheque denied that he was told there were then funds in the bank to meet the cheque, but that there would be funds on the following morning, as certain notes spoken of would be discounted. If the difference between the two statements is important, the jury having found as to this in favour of the plaintiff, their finding upon the credit of witnesses, the

matter being wholly within their province, ought not to be interfered with by the Court, except in a very clear case where their finding is manifestly wrong.

Then, assuming the account given by the plaintiff's witness, John Neill, to have been correct, I take it the application by the defendants' agent for payment of the premium and the retention by him on the 21st of October of the cheque, must be the same in effect as if the assured had then given him a new cheque, which, there being then funds in the bank, would, according to the decision in *Hughes v. The Canada Permanent Building Society*, 39 U. C. R. 221, be a payment. But it has been urged on behalf of the defendants that the cheque not having been taken by the defendants' agent till the 24th of September, the quarterly premium having fallen due on the 10th of August, the policy had lapsed, and no act of the defendants' agent could waive the forfeiture or re-establish the policy. This contention, it seems to me, is answered and displaced by the following condition endorsed on the policy: "If for any reason a premium is received after it becomes due, it is upon the express condition that the party whose life is insured is at the time of the receipt of such premium in good health, and of correct, sober, and temperate habits; and if the fact is otherwise, the policy shall not be put in force by such receipt."

The evidence, I think, abundantly shews that the company was aware of the practice of their agent McNairn to grant indulgences to policy holders, of which they did not disapprove, as the returns made monthly by the agent shewed a number of premiums overdue, in respect of which the printed receipt of the company was retained by the agent, and subsequently delivered to the policy-holder on payment of the premium; and in cases where the company did not wish this indulgence to be given, there was endorsed on the back of the receipt the direction, "if not paid, return." But without this, by force of the decision in *The Montreal Ins. v. McGillivray*, 13 Moore P. C. 125, and *Campbell v. The National Ins. Co.*, 24 C. P. 133, McNairn

and his successor McCabe, were both general agents, with power to bind the defendants in this respect.

It was also further contended, on behalf of the defendants, that the only evidence of payment admissible under the contract is the receipt of the company signed by the president or secretary, and as that was not delivered up to the assured when the cheque was given, the plaintiff cannot be permitted to prove payment aliunde. This contention would have been equally entitled to prevail if payment had been made in gold, and on the day the premium fell due. The provision is one for the protection of the company against their being charged with payments made to persons unauthorized to receive them, and the holding by an agent of the receipt was necessary before a valid payment could be made to him.

In this case the agent had the receipt, and attached it to the cheque; and if he had been paid in money, I entertain no doubt he would, after such payment, be treated as holding it for the assured, and if destroyed or retaken into the possession of the defendants, its existence at the time of payment and the payment itself could have been established without its production. If I am right that the cheque was payment in effect, the same result must follow.

On the whole case, therefore, I am of opinion the verdict of the jury should stand, and the defendants' rule be discharged. By the result, no possible injury happens to the defendants, as they were allowed, on entry of the verdict, to deduct the balance of the year's premium, as by the express provision of the policy they were entitled to, and they ought not, except in obedience to some clear rule of law, to escape an obligation that if the assured had only lived another day they would have had no pretence for disputing, and yet would not have received any greater benefit from the contract than they are now receiving. If companies permit their agents to give indulgences, they ought not to be allowed to reap the benefit of the indulgence without incurring the equivalent liability.

Rule absolute.

ST. JOHN V. BULLIVANT.

Mortgage of vessel—Fixtures—Trovee by mortgagee.

Plaintiff was mortgagee of 64 shares in a vessel belonging to defendant, and on the defendant's insolvency was allowed by the creditors and the assignee to take her as she stood at a valuation. Defendant had previously removed from the vessel a piano and several other articles, and had substituted stoves for steam heaters.

Held, that in the absence of fraud, the plaintiff was concluded by the settlement with the assignee by which he took the vessel as she then stood, and could not recover these articles; and that the mortgagor, being in possession, was entitled to manage the vessel, as he thought best, and to remove such articles upon his substituting others for them.

Semhle, that a piano on board of a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances."

TROVEE for certain goods, viz., a piano, two steam heaters, a bell, a syphon, and three coffee urns.

Pleas : not guilty, and traverse of property.

The case was tried at St. Catharines, before Wilson, C. J.

The defendant was the owner of a propeller, the "City of St. Catharines," subject to several mortgages which became vested in the plaintiff.

By mortgage of the 11th of April, 1876, the defendant and Francis Bullivant mortgaged sixty-four shares in the vessel to the plaintiff, subject to redemption on payment of \$6,500, payable in two payments on the 11th of April, 1877, and 1878, at 18 per cent. They declared they owned the whole, and that she was free from encumbrances, the defendant claiming 37-64 and Francis Bullivant 27-64 shares. On the 15th of April, 1876, (four days after) the mortgagee, by endorsement, extended the time for payment, one-third to be payable in a year, and one-third in one and two years thereafter.

On the 1st of August, 1877, the plaintiff obtained a transfer of a prior mortgage from the defendant to one Hamilton for \$4,000, with her boats, guns, ammunition, small arms, and appurtenances.

On the 27th of July, 1876, the plaintiff obtained a transfer of another mortgage, dated 10th of March, 1875, from one Balfour, for \$2,000, like the preceding.

On the 29th of May, 1876, the plaintiff obtained a transfer of another mortgage, dated 18th July, 1874, from one Morris, like the preceding in form.

Some time in the spring of 1877 the plaintiff took possession of the propeller.

In April, 1877, the defendant went into insolvency.

On the 10th of April, 1879, the plaintiff put in his claim of some \$17,229, and also claimed repairs on the vessel \$797.39, stating that he held as security 37-64 shares in the propeller. He stated the value of each share to be \$133.18. He claimed to rank on the estate, and to vote on \$17,299, less the amount of his security, viz., \$4,927, or for \$12,301.38.

It also appeared that the defendant had covenanted with the plaintiff to pay him both the prior mortgages.

About July, 1879, it was arranged between the creditors and the plaintiff that he should have the propeller, and a resolution was passed that he be allowed to retain his security at the value of \$9,920, and that the assignee should convey his interest to him.

On the 31st of December, 1879, the defendant and Francis Bullivant made an agreement with the plaintiff settling their liability with him at \$10,063.41, subject to a reference thereof to Mr. Woodruff. They agreed to pay the amount so to be settled on the arrival of some expected moneys from England, to be taken by the plaintiff in full settlement of all demands. Mr. Woodruff then fixed the amount at \$9,826.91.

Both the Bullivants appeared to have been separately insolvents, and both had since had their discharge.

On the 31st of December, 1879, the plaintiff wrote to the Bullivants: "The agreement signed by us to-day in settlement of the matter in dispute between us is intended to cover all claims of every kind which I hold against you, except those mentioned in the schedule annexed to said agreement, but this is not in any way to include the question of costs."

This schedule did not affect the matter in dispute.

The boat was stated to have been built in 1874.

The plaintiff, after all these transactions, received information that the defendant had in the fall of 1876 removed the articles in question from the boat, she then being under mortgage to the plaintiff, but while the defendant, mortgagor in possession, was running the boat. The plaintiff demanded the articles, and they were refused, and this action of trover was brought.

The defendant swore that she was used for freight and passengers: that the piano was taken off in the fall of 1874, and put in again for the season of 1875, and taken off that fall and not put back.

The heaters were used for warming the cabin by steam. In the fall of 1876 the defendant removed them, putting up stoves instead, as he found them inefficient, and one had been burst. The stove was used instead, and was in the boat at the time of the insolvency. The bell was taken off, as he said it was no use, and worth \$25 or \$30. The steam syphon he took away, as it was too expensive to use, and the engineer complained of the loss of steam by its use. The three tea urns were screwed to the table. The defendant said he removed them in the fall of 1876, being useless, as when the steam was out of the boiler they could not use them: they were probably worth \$10.

He stated that he supposed all these articles belonged to his assignee. In his schedule of assets he put down: "Tools, books, &c., \$200." He said Mr. Dyers, the first assignee, knew of them.

It was agreed that the value of these articles was \$320.

These articles were removed from the vessel some time before the plaintiff's taking formal possession under his mortgages, and before the insolvency.

The plaintiff said he bought the vessel from the assignees as she stood. When the plaintiff took possession under his mortgage, he got Mr. Malcolmson to make an inventory of all the things. This was produced, dated in the fall of 1877, and did not, as Frederick St. John, a son of the plaintiff, and a witness in the case, proved,

contain these articles. He also proved that to his knowledge there was a piano and steam heater on board in 1875 or 1876. He also proved that after the plaintiff got the boat, and ran her as a freight boat, they found the stove quite enough for heating.

The learned Judge was not satisfied that the plaintiff ever got any title to the articles in question from the assignee, and he entered a verdict for the defendant, with leave to the plaintiff to move to enter it for him for \$320.

November 18, 1880. *McClive* obtained a rule *nisi* on the leave reserved.

February 9, 1881. *Bethune*, Q. C., shewed cause. It is not clear that these things were on the vessel when the mortgage was given. But a mortgage on a vessel is different from that on goods. The mortgage simply conveyed the tackle, &c., not the piano. After the mortgage debt was paid the mortgagee could not sue the mortgagor. As to \$9,000, it was settled by the vessel, the balance by the securities taken.

McClive, contra. From the evidence the articles in question were all placed on the steamer and used for the purposes of the steamer; the piano for the amusement of the passengers, and the other articles for certain other well known purposes. They thereby became part and parcel of the vessel in the same manner as fixtures generally belong to buildings to which they are fixed: *Gale v. Laurie*, 5 B. & C. 156; *Patton v. Foy*, 9 C. P. 512. As these articles were removed before the insolvency of the defendant, who made an assignment in April, 1877, they belonged in law and fact to the mortgagee, and a subsequent valuation by St. John (the plaintiff) in the insolvency proceedings of his claim did not deprive him of his right to bring this action. See secs. 84, 85, and 86 of the Insolvent Act of 1875.

March 11, 1881. HAGARTY, C. J.—It seems to us impossible to support the plaintiff's claim to these articles on this evidence. We would conclude, as a matter of fact, that he

was aware that the bulk of the articles, the piano and the heaters, had been there, and by Malcolmson's schedule were no longer there, before he obtained the boat from the assignee. She was his security, and he was allowed to take her as she stood at the agreed on sum.

That was the time, if ever, to raise the present question. He allows the creditors to settle with him, as may well be assumed, for all claims connected with his security on this boat. He allows the defendant to settle with him, as he declares, in full of all demands, at a named sum.

It is difficult to see, in the absence of any proof or suggestions of fraud, how such arrangements can be held to operate otherwise than as complete and final settlements between the parties.

At the insolvency everything belonging to the defendant vested in the assignee, except such things as might be lawfully held by the plaintiff under his security.

The plaintiff affected to settle in full with both interests. It would be unfair to the creditors to withhold information as to any security or claims against any one in respect of any articles claimed to pass to him as part of such security. It would be still more unfair to the defendant, who might well consider that he was settling the whole of his large and apparently most unfortunate dealings with the plaintiff.

His counsel urges that the abstraction of these articles was only discovered after all these arrangements.

After reading the evidence of his son, and the employment of Malcolmson to make an inventory long before any of these arrangements, we can hardly accept this as a reason for burdening this unfortunate mortgagor with a fresh burden.

The case may be safely rested on the basis of these arrangements, which we consider finally bound all the parties. If it were necessary to go further, we would hesitate before holding that such an article as a piano, merely used for casual amusement on a vessel, must be considered as passing to a mortgagee under general words, such as are here used.

So long as the mortgagor remained in possession he could manage the boat as he thought best. He might either fail to get or might give up seeking to carry passengers, and thus find a piano a most unnecessary expense.

As to the heaters, he appears in good faith to have substituted stoves, which several witnesses say were equally useful for heating purposes. So as to the syphon and urns.

It was not suggested that any of these things were removed for the purpose of stripping the boat or affecting the plaintiff's security in any way.

To hold that a mortgagor of a ship cannot in good faith substitute one article for another, such as was done here, seems to us an unnecessarily harsh and narrow construction of the law. But we rest our decision on the first grounds.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

PECK V. PHOENIX MUTUAL INSURANCE COMPANY.

Fire insurance—Change of occupation—Notice of.

The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were re-let to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendants' local agent, was notified of this change, and went on the premises and saw the tenant at work making a desk. He wrote to the head office at plaintiff's request, notifying them of this, and they answered that if the policy were sent, with a letter of explanation, they would consent in writing on it, adding, "Is there woodwork done on the premises?" The matter was then allowed to drop. The policy contained a condition that "any change material to the risk, and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may * * cancel the policy. * * "

The jury are asked whether the change was material, and whether it was fairly communicated to the defendants; and they found for the plaintiff. *Held*, that the verdict should not be disturbed.

Seemle, that the transmission of the policy for endorsement was not essential.

ACTION on a fire policy. Pleas. 1. *Non est factum*. 2. No insurable interest. 3. A change in the nature of the business of plaintiff, material to the risk, without proper notice to the defendants.

Issue.

The trial was at London, at the last Fall Assizes, before Armour, J., and a jury.

The facts were as follow:—Plaintiff had insured his premises, described as "occupied by a tenant as a grocery store and dwelling." During the risk the occupancy was changed.

Mr. Dickson was the defendants' resident local agent. The plaintiff's son-in-law became his tenant. Dickson and the plaintiff discussed the change. He was told the new tenant was "a furniture dealer." Dickson was in the shop, and saw the business being carried on by the new tenant. The furniture was in the front shop, and at the rear there was a small space about 10 feet by 10, where there was a bench and tools, and he saw the tenant making a piece of

furniture, called a "Secretary," for the plaintiff. He saw all this before the conversation.

He told the plaintiff that on account of the change it would require a larger premium, and that the company would have to be notified, and the premium arranged for.

Plaintiff said it was not more hazardous, and the agent said it must be referred to the head office, and he said he would write, as the plaintiff wished him to do. He wrote: "Mr. Richard Peck requests me to inform the company that the premises insured by him under policy 359, and until recently used as a grocery store, are now rented to and occupied by a furniture dealer, and wishes the consent of the company to the change."

The defendants answered: "If he returns his policy to us, with a letter of explanation, we will consent by endorsement. Is there any wood work done on the premises?"

The agent said he either read or explained this reply to the plaintiff, who said he would look up his policy and attend to it. The agent said he forgot to speak again about it. When the premium or assessment was paid to the agent, the latter knew the store was so occupied.

The plaintiff said when Dickson spoke to him he told him to do all that was right. He thought that Dickson then had the policy. He swore that he told him it would be a furniture shop, and that this tenant would do a little repairing, and would keep a bench and tools: that he always thought it was all right, and he told Dickson if any more explanation was needed to send it, and that this tenant would do repairing and rough work.

Evidence was given that some few articles were made at the bench in the little back place, and defendants' witnesses swore that there was an extra premium required where furniture was manufactured, as distinguished from a place where furniture was merely bought and sold.

The jury were asked, first, was the change material? Secondly, if so, was the fact of the change fairly communicated to the defendants? The jury found for the plaintiff.

November 16, 1880. *Bethune*, Q. C., obtained a rule *nisi* for a new trial, on the ground that there was no evidence to go to the jury of notice to the defendants or their local agent of the change in the occupation of the premises from a grocery store to a furniture manufactory; and on the law and evidence, and weight of evidence.

February 7, 1881. *W. R. Meredith*, Q. C., shewed cause. The notice sent by Dickson, the company's agent, to the head office, that the premises were occupied by a furniture dealer, was a sufficient notice to the company, and it fairly described the change of occupation. The principal business carried on was that of a furniture dealer, the cabinet-making done on the premises being of a trifling character, and only such as was incidental to the business of a furniture dealer in country places. The question was fairly left to the jury, without objection by the defendants' counsel, and the Court ought not to interfere. The company's question, "Is wood work done on the premises," brings the case within the decision in *Nicholson v. The Phoenix Mutual Ins. Co.*, 45 U. C. R. 359, and if the defendants were not satisfied, they should have demanded in writing an additional premium, or cancelled the policy, as provided by condition 3 of ch. 162, R. S. O.

Bethune, Q. C., contra. The business carried on was not properly described, and an additional rate was required where wood work was done on the premises. When defendants were asked if wood work was done on the premises, and got no reply, they were entitled to assume that the notice did not intend to convey the idea that anything but the business of buying and selling furniture was carried on, and therefore there was a breach of the condition.

March 11, 1881. HAGARTY, C. J.—The condition is, "Any changes material to the risk, and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent; and

the company so notified may return the premium for the unexpired period, and cancel the policy, or may demand, in writing, an additional premium, which the assured shall forthwith pay; and if he neglect to make such payment forthwith, after receiving such demand, the policy shall be no longer in force."

We do not see any clear ground for our disturbing this verdict.

If this change were material, we cannot say that the jury were wrong in considering that it was fairly notified to the company, or their local agent Dickson. With full knowledge of the new occupation, and that the tenant was making a piece of furniture, he notifies his principals of the change, and that a "furniture dealer was then in possession. The "wood work" apparently referred to by them, was of a very small nature, and quite subsidiary to the main business.

We think it would be insisting on an unfair particularity to require more to be done by the assured, nor do we see that the question as to wood work, asked by them of their agent, was, so far as the plaintiff is concerned, of much moment. He could have readily answered if he pleased, and we see no reason for supposing that the plaintiff in any way refused information, or made any concealment.

If the communication were reasonably sufficient, the non-transmission of the policy for endorsement does not seem to be essential.

The plaintiff differs somewhat from the defendants' agent in his account of what took place, and the jury seem to have accepted his statements as truthful and reasonable under the circumstances. We also think that there was a sufficient notice in writing to the company on the facts in evidence.

We repeat, we do not think we can interfere. To set aside this verdict fairly obtained from the jury, would seem to us a harsh exercise of discretion.

Rule discharged.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM FEBRUARY 2ND, 1880, TO FEBRUARY 19TH, 1881.

ALIENATION OF LAND.

Restraint upon.—See WILL.

AMENDMENT.

See CORPORATIONS.

See PUBLIC SCHOOLS, 3

ARBITRATION AND AWARD.

Where the reference was only for the purpose of ascertaining and awarding the damages sustained by the plaintiff by a fire negligently set by the defendant, and the defendant agreed to pay the amount awarded; and it was provided that the costs of the arbitrators and award, &c., should be paid by the party entitled thereto, in whose favour the award should be made.

Held, that the arbitrators had no power to give a month for payment of the sum awarded, or to direct that the defendant should pay the

costs, but that these directions were severable from the rest of the award, and might be rejected.

In such a case the proper course is to discharge generally a rule to set aside the award, not to make it absolute in part. *Re Egleston and Taylor*, 479.

No jurisdiction to set aside award made under Railway Act, 31 Vic., ch. 28, D.—See RAILWAYS AND R. W. COS., 3.

See MUNICIPAL CORPORATIONS, 3.

ASSESSMENT AND TAXES.

Sewers.—See MUNICIPAL CORPORATIONS, 2.

Drainage.—See WATER AND WATERCOURSES.

ASSIGNMENT.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2—CHOSE IN ACTION.

ATTACHMENT OF DEBTS.

Prohibition—Division Court Clerk—Garnishing money in hands of.—*Semble*, that money paid to a Division Court Clerk for a suitor in a cause is paid in to the use of the suitor, and is garnishable.

Per CAMERON, J.—It does not become a debt from the Division Court Clerk to the suitor till demand made, and so is not garnishable until then.

Where the garnishee, who was clerk of the First Division Court of the county of York, had submitted himself to the jurisdiction, and had paid the money in his hands into the Tenth Division Court of the county, from which latter court the summons issued, and the Judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable.

Held, that the order of GALT, J., discharging a summons for a prohibition was right; and a rule *nisi* to rescind the same, and for a writ of prohibition, was discharged.

Dolphin v. Layton, L. R. 4 C. P. D. 130, remarked upon. *Bland et al. v. Andrews et al.*, 431.

BANKRUPTCY AND INSOLVENCY.

1. *Insolvency—Set-off—Lease.*—By a lease, made by the defendant to the insolvents, the lessees were "to get pay for improvements at a fair valuation, and to have the right of purchase during the term "by paying the lessor first all claims by way of notes, or otherwise he holds, or may hold against the said lessees, and the sum of \$235.15 as purchase

money," &c. In January, 1875, an attachment under the Insolvent Act of 1869, was issued; and in March defendant filed his claim, which included a note for \$500, most of which sum had been expended in improvements, and had been obtained for that purpose. There had been a valuation of the improvements at the end of the term in 1877, at \$275, in which defendant did not take part, and the assignee sued defendant for that sum on his covenant.

Held, ARMOUR, J., dissenting, that the note formed an equitable if not a legal set-off against the claim: that the right to such set-off was matter of procedure, and governed therefore by the Act of 1875, not the Act of 1869; and that defendant was not precluded by having proved his claim.

Quere, whether under the lease the payment of defendant's claim was not a condition precedent to his paying for improvements.

The difference between our Insolvent Law, as to set-off, and that in England and the United States remarked upon.

Per ARMOUR, J., the question was governed by the Act of 1869, and the plaintiff's claim not being liquidated, the defendant's claim could not be the subject of set-off. *Mason v. Macdonald*, 113.

2. *Sale of goods—Trove against assignee in insolvency—Absence of bill of sale—Change of possession.*—In trover for goods against an assignee in insolvency, *Held*, following *Re Barrett*, 5 App. R. 206, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do.

It was alleged that the plaintiff, who was living with his mother, gave

the horses in question to her for his board, but no price was fixed for them, and they were kept at the house and used by the plaintiff as before: *Held*, that there was no sufficient change of possession to dispense with a registered bill of sale, and the sale was void as against the assignee in insolvency of the plaintiff. *Snarr v. Smith*, 156.

3. *Action for wages—Discharge in insolvency—Privileged claim—Pleading.*—To an action by a commercial traveller for wages, defendants pleaded a deed of composition and discharge in insolvency. The plaintiff replied that the claim was privileged:

Held, on demurrer, replication good, as it did not appear that the plaintiff ever gave any express consent to the discharge, and he was therefore not affected by it.

ARMOUR, J., dissenting. *Fryer v. Shields et al.*, 188. (Reversed in Appeal.)

4. *Interpleader—Chattel mortgage—Defective registration—Fraudulent preference—R. S. O., Cap. 118.*—G. & E., bakers, on the 18th May, 1880, agreed with the defendants that if the latter would supply them with flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on the 12th. G. & E. absconded on the 12th, and on

the 14th defendants took possession under a clause in the mortgage which allowed them to do so in case the mortgagors "should attempt to sell, dispose of, or in any way part with the possession of said goods," and removed them to their own warehouse. The mortgage also contained a re-demise clause. The jurat of the affidavit of *bona fides* was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 17th June, and the sheriff seized the goods under it on the 30th June.

Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, to enable defendants to carry on their business; and therefore there was, under R. S. O., ch. 118, no preference of defendants, who became creditors only by this act.

Held, also, the property having passed by the bill of sale, and the defendants being in actual possession when the plaintiff's attachment was issued, that they had a right to retain the goods as against the plaintiff, subject to the mortgagors' right of action, if any, for taking possession before default.

Semble, however, that under the clause in the mortgage above mentioned, defendants were justified in taking possession when the mortgagors absconded, leaving no one in charge of the goods. *Robins v. Clark et al.*, 362.

See SHIPPING.

BANKS.

Payment by bank on forged indorsement of cheques—Right of the drawer to recover back.]—The plaintiffs, a money loaning company, were imposed upon by one S., who, in July, 1877, forged the name of B. to an application for a loan of \$2,000, to a mortgage on B.'s land, to correspondence with the plaintiffs, and to the endorsement of the cheques, given in August and September by the plaintiffs on defendants, their bankers, for the money borrowed.

H., the plaintiff's valuator, certified that he had inspected the property and placed his name as a witness to the signature of B. to the application, but he never saw the property or the signature, and acted solely on what S. told him. S., in June and July, 1878, sent money to the plaintiffs, for the first annual instalment, and the plaintiffs never discovered the fraud until July, 1879. The cheques had been presented to defendants through other banks, and paid in good faith, and had been sent to the plaintiffs in the following month, with other vouchers, and with their books, in which the balance had been made up each month, as usual.

Held, that the plaintiffs were entitled to recover from defendants the amount so paid by the defendants on the forged endorsements, and charged to the plaintiffs: that the negligence of plaintiffs' valuator formed no defence, for it was in no way the cause of defendants paying the cheques; that the acceptance of the cheques in the monthly account was no bar, being made under a mistake of fact; and that defendants could not claim to be allowed in reduction the moneys remitted by S. on the forged mortgage.—*Agricultural Investment Co. v. The Federal Bank*, 214. (Affirmed in Appeal.)

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Goods in bond—Chattel mortgage—Description.*]—Where the goods forming the subject of a chattel mortgage are in bond, it is not necessary that the mortgage should be registered.

Semble, that the description of goods as "in bond," means in the Customs Warehouse, and is a sufficient description as regards locality. One of the mortgages was invalid, being to secure the plaintiff as endorser of notes not payable within a year. *May v. The Security Loan and Savings' Company*, 106.

2. *Chattel mortgage—Chose in action—Assignment of—Liability of assignee.*]—The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor. These goods were so taken, and defendant, to whom the mortgage had been assigned by H., took possession under it, for which the plaintiff sued in this action, alleging that H., the mortgagee, verbally agreed to pay these executions, which were made part of the money secured.

Held, that the defendant, as assignee, took subject to such agreement, (which did not vary the terms of the mortgage,) though without notice of it; and that the plaintiff therefore was improperly nonsuited. *Martin v. Bearman*, 205.

3. *Chattel mortgage—Affidavit—Debt payable at future day.*]—The affidavit annexed to a chattel mortgage omitted the words, "or accruing due," after those "so justly due": *Held*, that the debt might be stated as due when it really was due, and

that it need not be necessarily stated as either due or accruing.

The mortgage shewed the debt in the proviso as only becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence shewed it was given to secure an overdue debt: *Held*, that the mortgage could be upheld, regarding it as given for a present debt to be paid at a future day.

The affidavit stated that the mortgage was not granted for the purpose of protecting the goods and chattels against the creditors of the two mortgagors, naming them, or preventing the creditors of the said mortgagor from obtaining payment of any claim against him, the said mortgagor: *Held*, sufficient, for that the word mortgagor would mean each of the mortgagors previously mentioned. *Farlinger v. McDonald*, 233.

4. *Chattel mortgage—Renewal.*—*Kissock v. Jarvis*, 9 C. P. 156, as to the necessity of the renewal of a chattel mortgage from year to year, approved of and followed, notwithstanding the subsequent legislation contained in R. S. O. c. 119. *Beaumont v. Cramp, et al.*, 355.

Absence of, may be objected to by assignee in insolvency on alleged sale by insolvent.—See BANKRUPTCY AND INSOLVENCY, 2.

See BANKRUPTCY AND INSOLVENCY 4—SHIPPING.

BILLS AND NOTES.

1. *Promissory note—Death of endorser—Notice of dishonour.*—S. endorsed a note to the plaintiffs for the accommodation of the maker,

and the plaintiffs discounted it at a bank. S. died before it fell due, and at its maturity, on the 8th of March, 1879, it was protested at the bank for non-payment, where the death of S. was unknown, and notice was sent addressed to S. at the place where the note was dated. The defendant, executor of S., proved the will in January, and plaintiffs who knew of the death of S., had written to his son three days before maturity, calling his attention to the note. The plaintiffs having taken it up and sued defendant.

Held, that the notice was insufficient. *ARMOUR, J.*, dissenting. *Cosgrave et al., v. Boyle, Executor of James Stuart*, 32. (Affirmed in Appeal, 5 App. R. 458, but reversed by the Supreme Court, 11th April, 1881.)

2. *Promissory note—Guarantee—Sufficiency of—Parol evidence.*—The defendant, after a note payable to the plaintiff had become due and while it remained unpaid, endorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. T. D. & Co. (the plaintiffs), on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security.

Held, that the evidence that the giving of time to C. was the consideration for the guarantee did not contradict the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration. *Davies v. Funston*, 369.

See PRINCIPAL AND SURETY, 1.

See GUARANTY, 2.

BY-LAWS.

Validity of, may be questioned on motion to quash conviction under.] —
—See MUNICIPAL CORPORATIONS, 1.

Where passage of, granting bonus to a railway, procured by bribery, Municipal council may refuse finally to pass.] —See RAILWAYS AND R. W. COS., 1.

See PRACTICE—PUBLIC SCHOOLS, 1, 2.

CERTIORARI.

Objection to irregularity of.] —
See CONVICTION.

See CRIMINAL LAW—JUSTICE OF PEACE, 2.

CHOSE IN ACTION.

Assignment—R. S. O. ch. 116, sec. 9—Pleading.]—*Declaration*, that D. by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, &c., &c.: *Held*, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law.

Mitchell v. Goodall, 44 U. C. R. 398, and *Brice v. Bannister*, L. R. 3 Q. B. D. 569, distinguished.

The second count stated that D., being largely indebted to plaintiff, and being pressed by him for payment, it was agreed that D. should

assign to plaintiff, to secure part of said debt, \$500 due and to become due to D. by defendants for work done by D.: that D. gave plaintiff an order upon defendants to pay same to plaintiff: that plaintiff notified defendants, who represented to plaintiff that if he would present said order as soon as they had examined said work, which would be before December, 1879, they would pay the \$500 to him: that by said representation plaintiff was prevented from proceeding against D. to recover said \$500: that afterwards and before said December defendants, being liable to pay said sum, and well knowing that plaintiff, relying on said representation, refrained from such proceedings, paid the same over to D., in fraud of plaintiff, and defendants thereafter wrongfully refused to pay same to plaintiff: *Held*, good, as disclosing a cause of action upon an assignment of a debt due by defendants to D. for work and labour performed for them by D., and a promise on their part to plaintiff to pay such debt. *Smith v. The Corporation of Ancaster Township*. 86.

COBOURG HARBOUR.

See CORPORATIONS.

CONSTITUTIONAL LAW.

See RAILWAYS AND R. W. COS., 6 —TAVERNS AND SHOPS, 2.

CONVICTION.

Motion to quash—Objections to certiorari.] — In showing cause to a rule *nisi* to quash a conviction, objection may be taken to the re-

gularity of the *certiorari*, and a separate application to supersede it need not be made.

Where, therefore, on an application made after notice to the convicting justices for a rule for a *certiorari* the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was

Held, affirming the decision of GALT, J., that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the *certiorari* was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged.

CAMERON, J., dissented, being of opinion that a substantive motion should be made to quash the writ of *certiorari*; and that the conviction being before the Court under a writ of *certiorari* un-superseded, the validity of the conviction should be inquired into. *Regina v. McAllan*, 402.

See MUNICIPAL CORPORATIONS, 1
—RECOGNIZANCE—SUNDAY.

Title to land coming in question.]
—See JUSTICE OF PEACE, 1.

Once brought into Court, there for all purposes.—See JUSTICE OF PEACE, 2.

For a third offence, for selling liquor without license, quashed.—See TAVERNS AND SHOPS, 1.

CORPORATIONS.

Cobourg Harbour Commissioners—22 Vic. ch. 72—*Corporation—Pleading—Amendment.*—The plaintiff sued “The Commissioners of the Cobourg Town Trust,” in whom the

harbour at Cobourg is vested in fee by 22 Vic. ch. 72, for damages for loss of his vessel, caused by the negligence of defendants, who by their plea merely traversed the negligence. At the trial plaintiff was nonsuited, on the objection that defendants were sued as a corporation, but were not so under the statute.

Held, that this objection should have been raised by plea, and was not open to defendants on this record; and *Seem*, that if open, defendants were a corporation.

Leave was granted to amend, if desired, by substituting the names of the Commissioners. *McSherry v. The Commissioners of the Cobourg Town Trust*, 240.

See RAILWAYS AND R. W. Cos., 5.

COSTS.

1. A count having been drawn so as to invite a demurrer, the demurrer was overruled without costs. *Smith v. Corporation of Ancaster Township*, 86.

2. *Security for costs*—*R. S. O. ch. 50, s. 71—Practice.*—An order for security for costs cannot be obtained under sec. 71 of the Common Law Procedure Act (ch. 51, R. S. O.) upon an affidavit made by defendant's attorney. That section requires the affidavit to be made by the defendant personally.

An application made upon the affidavit of the solicitor of defendants, a corporation, was therefore refused. *Martin qui tam v. The Consolidated Bank*, 163.

No power to impose on private prosecutor, where indictment for obstructing highway removed by certiorari at his instance, and defendant acquitted.—See CRIMINAL LAW.

CRIMINAL LAW.

Private prosecution at suit of Crown—Costs.—Where an indictment for obstructing a highway had been removed by *certiorari*, at the instance of the private prosecutor, into this Court, and defendant had been acquitted, *Held*, that there was no power to impose payment of costs on such prosecutor.

The Court, however, has power to make payment of costs a condition of any indulgence granted in such a case; such as the postponement of the trial, or a new trial.

See JUSTICE OF PEACE, 1.

CROWN TIMBER.

Timber licenses—Rights acquired by R. W. Co. before Confederation over Crown lands—Assignees of R. W. Co. not liable for trespass thereon.—*Held*, ARMOUR, J., dissenting, that the timber licenses, claimed by the plaintiff, as licensee of the Ontario Government, were subject to the right of the Canada Central Railway Company, acquired before Confederation, to construct their road across the Crown Lands, over which the licenses in question extended; and that the defendants, assignees of the railway company, were therefore not liable in trespass for entering upon and cutting timber on the said limits in prosecution of the work of building the said railway. *Foran v. McIntyre et al.*, 288.

DEED, PROOF OF.

Proof of lost deed—Memorial signed by grantee—Possession—Knowledge of patentee C. S. U. C.

ch. 88, sec. 3.—In ejectment it appeared that the lot in question had been granted in 1812, with other lots, to M. A. P., M., and P. In order to prove the alleged conveyance of the 13th February, 1816, by M. C. to W., which had been lost, the plaintiff put in a memorial thereof, registered December 19th, 1826, signed by the grantee, including an undivided moiety in all the land in the patent with other lands.

It was shewn also that W., in 1827, had mortgaged all the lands in this memorial with other lands, to a bank, which, in 1829, reconveyed them to the trustees under W.'s will: that in 1833, R. took a conveyance from the devisee of W. of three of the lots mentioned in the memorial, not including the lot in question; and that in 1834, proceedings were taken in partition on the petition of the devisee of W., under which this lot was assigned to W.

Possession had been held of this lot, not in accordance with the alleged lost deed, but by persons claiming under R.; but the Court held that the evidence failed to prove such possession for forty years, or that it was taken with the knowledge of W. or his devisee. The plaintiff claimed under a deed from such devisee executed in 1873.

Held, CAMERON, J., dissenting, 1. That there was sufficient proof of the lost deed from M. C. 2. That the plaintiffs claiming under W. were protected under C. S. U. C. ch. 88, sec. 3, as against the possession of R., his co-tenant, for less than 40 years. *Van Velsor et al. v. Hughson*, 252. (This case has since been argued in Appeal, and stands for judgment.)

DEFAMATION.

Slander—Incest—Special damage—Pleading.—A declaration by a married woman for slander, imputing that she had committed incest and adultery with her father, and alleging as grounds of special damage (1), the loss of the *consortium* of her husband, (2), the loss of the society of friends, was *held*, on demurrer, good, although the second ground was clearly insufficient, in not naming the friends. *Palmer v. Solmes*, 15

DEMURRER.

See Costs, 1.

DISTRESS.

Distress clause in mortgage—Seizure of goods of stranger—Abandonment of distress.—By a mortgage under the Short Forms of Mortgage Act, the interest was made payable on the 30th of January in each year, and the mortgage contained a power of distress for arrears of interest. On the 30th January, 1879, two years' interest was overdue, and on 23rd May following the defendants, under power of attorney from the mortgagee and his agents, entered upon the mortgaged premises, and distrained the plaintiff's goods for arrears of interest. The plaintiff was tenant of the mortgagor, and had entered after the mortgage. The defendants notified the plaintiff that they had distrained and sold the plaintiff's goods for \$8.75 and costs, being for a half year's interest, ending 30th July, 1879, in addition to the previous seizure and demand.

Held, that the defendants having abandoned the first seizure, could not

seize a second time for the same demand.

Held, also, that the half year's interest claimed by the second seizure was not due by the terms of the mortgage, and that the distress was for that reason illegal.

Quære, whether the goods of a stranger could be seized under such a distress clause. *La Vassaire v. Heron et al.*, 7.

2. *Distress for rent—Justification as owner—Estoppel.*—Where a party distrained, as landlord, on goods which as a matter of fact had, by subsequent agreement between himself and the tenant, but before the distress, become his absolutely: *Held*, that he might justify the taking on this latter ground.

ARMOUR, J.—Where a plaintiff claims double value for distraining when no rent was due, he must make such claim at the trial, and ask to have the jury directed upon it. *Bell v. Irish*, 167.

3. *Mortgage—Distress clause.*—A mortgage was drawn under the Act respecting Short Forms of Mortgages, with the addition of a clause that the mortgagor did "attorn and become tenant-at-will to the company, subject to the said proviso" [for redemption]. The mortgagees never executed the mortgage, which named a day for payment of principal more than three years from the date of the mortgage, and intermediate days for payment of interest half-yearly in advance.

Held, CAMERON, J., doubting, that a tenancy-at-will was created at a fixed rent equivalent to the interest, for which the mortgagee had all the remedies of a landlord, including the right to a year's rent, against defen-

dant, an execution creditor, who had seized the mortgagor's goods upon the land. *The Trust and Loan Company v. Lawrason et al.*, 176. (This case has since been argued in Appeal, and stands for judgment.)

DIVISION COURT.

Deputy judge—Power of deputy.]—Under the authority of the following deputation :—“ Belleville, Ont., 24th July, 1880. I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy to hold the Second Division Court of the County of Hastings, on Monday the 26th day of July, instant, at the Town Hall, in the Township of Sidney.—T. A. Lazier, junior Judge, C. H.,” the person therein named tried this case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August following, at the Judge's chambers in Belleville, outside the limits of the second division, but within the county, without having named a day and hour for delivery thereof in writing at the Clerk's office.

Held, (1) That the word “Judge” in sec. 20 of R. S. O., cap. 47, includes the junior Judge, and that the deputation was therefore valid. (2) That the proper construction of the same was, “to hold the Second Division Court of the county of Hastings, to be holden on Monday,” &c., and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the junior judge during the time of his appointment, wherever he might be within the County. And the rule was

therefore made absolute to rescind the order made by Galt, J., for a prohibition.

CAMERON, J., dissenting.—*In re Leibes v. Ward*, 375.

See ATTACHMENT OF DEBTS.

DRAINS.

See LIMITATION OF ACTIONS, 1—
WATER AND WATERCOURSES.

EASEMENT.

Right of way.]—See LIMITATION OF ACTIONS, 2.

ELECTIONS.

See RAILWAYS AND R. W. Cos., 1.

ESTOPPEL.

See DISTRESS, 2.

EVIDENCE.

Of judge's order to arrest.]—See MALICIOUS ARREST.

See NEW TRIAL, 1.

FORGERY.

See BANKS—NEW TRIAL, 1.

FRAUDS, STATUTE OF.

See MASTER AND SERVANT.

FRAUDULENT REPRESENTATION.

Deceit—Fraudulent representation as to mortgage—Duty of purchaser of.—Defendant was mortgagee of plaintiff's farm, and the latter, being unable to pay the mortgage, asked defendant to buy the farm, and defendant offered him therefor some cash and a mortgage for \$619, representing to him that the mortgage was a second mortgage; that the land was as good as defendant's own land, and that any money-lender would readily cash it at a small discount, thus inducing plaintiff, an ignorant man, to accept it, when in fact the defendant knew it was a fourth mortgage and almost worthless. After this an abstract of title was shewn to the plaintiff, but it did not appear that he read it or that it was read or explained to him.

The jury having found for plaintiff in an action for deceit, on motion for nonsuit:—*Held*, that there was no obligation on the plaintiff, as a matter of law, to examine the title or search the Registry Office, but that his omission to do so was matter for comment only; and that his having been furnished with the means of knowing, of which he did not avail himself, after the false statements had been made, was no answer to the action. *Seemle*, that on sustaining the verdict a reconveyance of the mortgage to defendant might be ordered.

Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant, and was made with intent to deceive, and did deceive the plaintiff, *Held*, that taking the whole statement together the verdict was not unwarranted. *Barr v. Doan*, 491.

GUARANTY.

1. *Sufficiency of.*—The plaintiff agreed with M. to repair a boiler in the latter's saw mill. During the progress of the work he received the following letter from the defendant: "As Mr. Morden's saw mill at Bismark is about to come into my hands right away, and as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible; everything at present is at a standstill waiting on you. Please push on the work and oblige yours truly, R. TAYLOR." The defendant's contemplated purchase was not carried out: *Held*, that the defendant had rendered himself liable by the above letter for the price of the work done, and that a nonsuit had been properly entered. *White-law v. Taylor*, 446.

2. *Construction.*—Declaration on a guaranty, by which in consideration of the plaintiffs accepting three notes of G. for \$751 each, in satisfaction of their claim against G. & Co., defendant did, "to the extent of \$751, guarantee the payment of the first two of the said notes according to their tenor and effect."

Pleas, 1. That the notes were payable to plaintiffs' order, and the plaintiffs endorsed the first note to certain persons who held it at maturity, and to whom in the event of G. not paying it, the plaintiffs were liable as endorsers: that G. notified defendant of his inability to pay it in full, and defendant paid thereon \$276, of which plaintiffs had notice, and afterwards G. failed to pay the second note, whereupon defendant paid the plaintiffs \$476, being the balance of the sum of \$751 guaranteed by defendant. 2. That the first two notes,

to the amount of \$1,276, were paid to plaintiffs as they became due, whereby defendant's guarantee was satisfied.

Held, on demurrer, pleas bad; for, as to the first, defendant was not liable to the plaintiffs' endorsees, and no express or implied request by the plaintiffs to pay was shewn; and as to the second, the guaranty was not satisfied by the payment by G. of \$751. *Crathern et al. v. Bell*, 473.

See BILLS AND NOTES, 2.

HUSBAND AND WIFE.

1. *Married women—Liability on contract—Separate estate—35 Vic. ch. 16, O.*—In an action on a promissory note made by the defendant G., a *feme covert*, married after 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay certain insurances on the trust estate, it appeared that the testator had devised his real estate to his trustees in trust to sell as one B. should deem expedient, and out of the proceeds to pay debts and invest the residue, and to expend the income in the maintenance of the trustee and his other children until the youngest should attain the age of twenty-one, and then equally to divide amongst all the children, the issue of deceased children to represent their parent: *Held*, that until the youngest came of age, C. had no separate estate available in execution, and that she was not liable on the note, *ARMOUR, J.*, dissenting, and holding that the true construction of the Married Women's Property Act is impliedly to enable a *feme covert* to incur debts, to make engagements, and to enter

into contracts as if she were a *feme sole*, and that the remedy in respect of any such debts, &c., should be against her personally, and should not depend upon the fact of her ever having had separate estate or not. *Clarke v. Creighton et al.*, 514.

2. *Separate estate—Tenancy by entireties.*—Action against husband and wife for the price of goods supplied in 1877 by plaintiff to the female defendant, who was married in 1856 without a marriage settlement, and who lived with her husband and family. The husband and wife were devisees in fee of land under a devise to them in 1866, and the sheriff had, in 1874, affected to sell to the wife the husband's interest in the land under an execution against the husband: *Held*, that the wife's interest in the land was not such as to entitle the plaintiff to a remedy against it.

Held, also, *ARMOUR, J.*, dissenting, that she was not liable to the plaintiff for the goods sold.

Per HAGARTY, C. J.—The fact of a woman (living with her husband and family) ordering household goods does not raise an implied personal promise to pay or bind her separate estate, or any other presumption than that she is acting as her husband's agent; and the interest of the husband, being inalienable, was not saleable under execution, under R. S. O. ch. 66, sec. 39.

Per ARMOUR, J.—(1) That whatever might be the effect of the sheriff's sale, it should be treated according to the effect ascribed to it by the plaintiff's and female defendant's conduct, viz., as having vested the estate in her. (2) That from the evidence it was the fair inference that the claim was the separate debt of the wife, part of it

having been incurred by her in respect of the business of farming, in which she appeared to be engaged on her own account; that she had contracted in respect of separate personal estate appearing to be hers, and that the husband's name should be struck out, and a verdict entered for the amount against her.

Per ARMOUR, J.—*Quære*, whether the effect of the Married Women's Acts may not be to do away with the estate by entireties, and make husband and wife, when devisees, tenants in common. *Griffin v. Patter-son and Wife*, 536.

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

Interest in land barred by conveyance by owner of part to railway company.] — *See* RAILWAYS AND RAILWAY COMPANIES, 2.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. *Insurance*—“*Grocery*”—*Sale of liquor — Right to recover.*] — The plaintiff, describing himself in the application as a grocer, and his store as being used as a grocery, insured with defendants his stock of groceries and patent medicines therein, and without the knowledge or assent of the defendants habitually retailed liquor there; but the jury found that the risk was not thereby increased.

Held, that there was no misrepresentation or concealment of a material

fact; that in insuring a “grocery,” defendants knew that liquor might be sold there; and that the plaintiff was entitled to recover. *Nicholson v. Phoenix Ins. Co.*, 359. (This case has been set down for argument in Appeal.)

2. *Fire insurance — Misrepresentation—Incendiarism.*]—Action on a fire policy, dated 21st May, 1879, on the ordinary contents of a barn, which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east-half of the lot, the plaintiff's homestead and home buildings being on the west-half, some distance across the road. In the application for the insurance, dated 13th May, 1879, plaintiff answered “No” to the question, “Is there reason to fear incendiarism, or has any threat been made?” On the same day the plaintiff had obtained another policy from defendants on his dwelling house and home buildings, the same question and answer being contained in his application therefor; and the thresher and reaper were then in the home buildings. The fire occurred on the 28th October, 1879.

At the trial it appeared that one M., the plaintiff's hired man, about the 8th of May had threatened to beat the plaintiff, and the latter, who was a nervous timid man, being alarmed, had had the premises insured: that he had sat up and watched for a night, and that he believed the premises had been set on fire. He denied having any reason for fear, except as to his home buildings. At the time of the fire the barn contained some grain and hay, and the threshing and reaping machine, for the loss of which this action was brought. One of the conditions on the policy was, that if

the assured misrepresented or omitted to communicate any circumstance material to be made known to the company, in order to enable them to judge of the risk, the policy would be avoided.

Held, ARMOUR, J., dissenting, that the plaintiff could not recover, for the plaintiff having admitted his own belief in the danger and acted upon it, his answer to the above question was untrue.

Per CAMERON, J.—The question was equivalent to “Have you reason to fear, or do you fear, incendiarism?” and, though the bodily threat did not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the insurance was effected on account of such fear, there was a clear misrepresentation in answering the question; and it made no difference that the property to be covered by the policy was not yet in existence.

Per ARMOUR, J.—The word “incendiarism” commonly applies to buildings only, and should not be extended in this case to cover personal property. The question should be construed strictly with reference to some particular ground of fear, otherwise the answer “No,” referring to the first part only, viz.: “Is there reason to fear incendiarism?” would be in every instance untrue; for every insurance is effected because the assured fears the happening of fire by accident, neglect, or design. And the evidence in this case shewed that there was no such reason as, operating on the minds of a majority of prudent men, would cause them to fear incendiarism; and therefore the question was truly answered. The question was also properly answered as to the property

covered by this policy, for the fear extended only to the home property; and as to the property intended to be covered by the policy but not then in existence, such as the crops, as to which no fear could exist. *Campbell v. The Victoria Mutual Fire Ins. Co.*, 412.

3. *Life Insurance—General Agent—Power to give time for premiums.*]
—J.-M. was insured by a life policy, under which thirty days' grace was allowed for payment of premiums, and a lapsed policy might be renewed within a year upon proof of health, payment of arrears, and a fine. S. was the resident secretary in Canada of the defendants, with the power of a general manager, and there was a local board of directors in Canada, but S. managed all matters connected with the receipt of premiums, communicated directly with the board in England, took his instructions from them, and laid before them monthly accounts from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S. asking him to make a note at three months. S. replied, “I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early.” He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th of August 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S. to be filled up for the

renewal of a note about to fall due, and saying that S. was absent from town, and that as the two premiums of November, 1878, and May, 1879, were so long overdue he should have to refer the matter to S. on his return, adding, "until these back premiums are paid the society is off the risk."

The death occurred on the 29th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, and due 10th August, 1879, which was unpaid, and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death the amount of these two notes was tendered to the defendants and refused. S. being examined, said he did his best to keep the policies alive, and had no doubt at the time of his authority to do so.

The jury found that the notes were taken by the defendants' agent as cash payments; that the taking of them was within his authority; and that he had waived payment upon the dates the premiums were due; and a verdict was entered for plaintiff.

Held, (HAGARTY, C. J., dissenting), that the evidence shewed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing shewing notice to the assured of any want of such authority: that the nonpayment of the note in August, 1879, while the note was current, did not determine the policy; and the verdict ought not to be disturbed.

Per ARMOUR, J.—The defendants in England had become aware by the returns sent by S. of the forbear-

ance granted by him, and had ratified it.

Per HAGARTY, C. J.—Admitting that S. might accept payment after the proper time, he could not make a binding executory agreement to give further time, extending perhaps beyond the duration of the life.—*Moffat v. The Mutual Life Assurance Society*, 561. (This case has been set down for argument in Appeal.)

4. *Life policy—Overdue premium—Payments—Waiver of forfeiture.*—J. N. was insured with the defendants by a policy, dated 8th May, 1877, on which quarterly payments were due on the 10th days of February, May, August, and November, in each year. The policy, among others, contained the following conditions: "If any premium shall not be paid when due the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the President or Secretary." "If, for any reason, the premium is received after it becomes due, it is upon the express condition that the party is in good health, and of correct, sober, and temperate habits, otherwise the policy shall not be put in force, &c." "In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium."

McN., the general agent of the company at Toronto, was in the habit of receiving payment of premiums after they were due, of which the company were aware, and did not disapprove. On 24th September, 1879, a cheque was given by the assured's firm to McN., with the

understanding that it was to be held till there were funds, as he had often done formerly. It was several times presented and dishonoured. On the 17th October McN.'s successor in office notified the assured that if the cheque were not paid at once the receipt would be returned to the company. On the 21st October, in answer to S., the agent's messenger, the assured's partner said that there were funds for the cheque at the bank, but as it was nearly three o'clock S. said that he would wait till the morning. That evening the assured was killed, and the cheque was therefore not presented, but was retained by the company.

The plaintiff produced all the premium receipts except that of 10th August, 1879. The jury found that the defendants' agent had waived the payment of the premium due on the 10th August, by receiving the cheque, and found a verdict.

Held, CAMERON, J., dissenting, that though the defendants appeared willing up to the 21st October to receive payment and keep up the policy, yet there was no waiver of the terms of payment, and no existing agreement or anything binding them to extend the time of payment and to remain liable, and that the cheque was not taken in payment.

Per CAMERON, J. The effect of the last above mentioned condition was to authorize the payment of premiums by cheque or note, and to thereby extend the time of payment; and the application by the defendants' agent on the 21st October for payment of the premium, and the retention of the cheque, was equivalent to accepting a new cheque, which (there being funds therefor) would be payment. *Neil v. The Union Mutual Life Insurance Company*, 593.

5. *Fire insurance—Change of occupation—Notice of.*—The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were re-let to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendant's local agent, was notified of this change, and went on the premises and saw the tenant at work making a desk. He wrote to the head office at plaintiff's request, notifying them of this, and they answered that if the policy were sent, with a letter of explanation, they would consent in writing on it, adding, "Is there woodwork done on the premises?" The matter was then allowed to drop. The policy contained a condition that "any change material to the risk, and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may * * * cancel the policy. * * *"

The jury were asked whether the change was material, and whether it was fairly communicated to the defendants; and they found for the plaintiff.

Held, that the verdict should not be disturbed.

Semble, that the transmission of the policy for endorsement was not essential.—*Peck v. Phoenix Mutual Insurance Company*, 620.

JUSTICE OF PEACE.

1. *Trespass to land**—32-33 Vic. ch. 22, sec. 60—*Title to land*—*Quashing conviction*.]—Where the defendants had been convicted, under 32-33 Vic. ch. 22 sec. 60, of trespass to land, and it appeared on the evidence before the magistrate that there was a dispute between the parties as to the ownership, *Held*, that it was a case in which the title to land came in question, and that the defendants had been improperly convicted, even though the magistrate did not believe that the defendant had a title, it not being within his province to decide on the title, but merely on the good faith of the parties alleging it. *Regina v. Davidson et al.*, 91.

2. *Certiorari*—*Quashing conviction*]—*Held*, that a conviction once regularly brought into, and put upon the files of, the Court, is there for all purposes; and that a defendant may move to quash it, however or at whosoever instance it may have been brought there.

Where, therefore, on an application for a *habeas corpus*, under R. S. O. ch. 70, a *certiorari* had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance.

Regina v. Levecque, 30 U. C. R. 509, distinguished. *Regina v. Wehlan*, 396.

LANDLORD AND TENANT.

Landlord and tenant—*Covenant to deliver possession on notice of sale*—*False representation of sale*—*Non-delivery of possession*—*Right of action*.]—Defendant leased a farm to

the plaintiff, with a covenant in the lease that in case of a sale of the premises, the plaintiff, upon receiving six months notice thereof, and compensation for all labour expended thereon to the date of the notice, would deliver up the premises to defendant at the end of the six months, the compensation being so fully paid. Defendant notified the plaintiff that a sale had been made, which was untrue, on which plaintiff refrained from putting in a crop in fallow prepared for it, and from doing other work; but having subsequently come to the conclusion that there had been in fact no sale, he decided to remain in possession, and did so, delivering no bill for compensation under the covenant in the lease. He then sued defendant for the false representation: *Held*, ARMOUR, J., dissenting, that the plaintiff could not recover for the loss occasioned by discontinuing to use the land in consequence of the notice of sale; and a nonsuit was directed. *Cowling v. Dixon*, 94. (This case has been reversed in Appeal.)

LICENSES.

Non-liability for entering upon limits covered by, and cutting timber.]—See CROWN TIMBER.

Servant liable for selling liquor where master not licensed.]—See TAVERNS AND SHOPS, 2.

LIMITATIONS (STATUTE OF.)

John C., being owner in fee of the land in question, sometime after 1854 placed his brother James C. in possession, rent free. In 1867 defendant, having married a daughter of James C., went to live with the

latter and occupied part of the house, at the instance of John C., who wished his niece to remain in the house and take care of her infirm mother. John C. died 2nd September, 1874, having devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year later, and the defendant and his wife continued in possession. In 1875 one G. went to the house with the plaintiff's husband, with the view of renting it, when defendant shewed them over the house, and said if it was going to be rented he would rent it himself and pay as much for it as any one, and he spoke of buying it.

The plaintiff having brought this ejectment in March, 1879, *Held*, that plaintiff was entitled to recover as against defendant, who set up the Statute of Limitations.

Per HAGARTY, C. J.—The defendant was never tenant to John C. during the lifetime of James C. and his widow; and the statute did not run in his favour till a year after the death of the latter.

Per ARMOUR, J.—The entry of the defendant in 1867 by John C.'s authority determined the tenancy at will of James C., theretofore existing, and a new tenancy at will by defendant and James C. thereupon began, which was determined by the death of James C.'s widow, when defendant became tenant at sufferance to the plaintiff, and her entry, by her husband, with G., acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and stop the running of the statute. *Cooper v. Hamilton*, 502.

See DEED, (PROOF OF.)

LIMITATION OF ACTIONS.

1. *Municipal Corporations—Defective drainage—R. S. O., ch. 174, sec. 491—Limitation of action.*—To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months: *Held*, bad, as sec. 491 to the Municipal Act, R. S. O., ch. 174, did not apply. *Sullivan v. The Corporation of the Town of Barrie*, 12.

2. *Easement—Obstruction—Limitation—R. S. O. ch. 108.*—*Held*, ARMOUR, J., dissenting, that the Ontario Act (R. S. O., ch. 108,) reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way *in alieno solo*, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel v. Doyle*, 65.

MALICIOUS ARREST.

Proof of affidavit and Judge's order.—*Held*, that the County Court Judge's order to arrest was well proved, under R. S. O. ch. 62 sec. 28, by the production of a copy certified as such, under the hand of the clerk of the Court; but that the affidavit on which the *capias* issued, filed in that Court, was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the Court, but not referred to or described in the certificate, *Timmins v. Wright*, 246.

MALICIOUS PROSECUTION.

Rejection of evidence—New trial—C. L. P. Act, sec. 289.—In an action for malicious prosecution, on the opening of the defence the defendant was called, and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on proceeding to state what he had heard, the learned Judge ruled that this was inadmissible, and that the persons who had told him these facts should first be called. They were then called and examined, and afterwards the defendant gave his evidence as to what they had told him. The jury found a verdict for plaintiff with \$500 damages.

Held, that the evidence was improperly rejected when offered; but, ARMOUR, J., dissenting, that as it had afterwards been received, no substantial wrong or miscarriage having been occasioned by the ruling, and that the verdict being satisfactory, a new trial should be refused under sec. 289 of the C. L. P. Act. *Bernard v. Coutellier*, 453.

MANDAMUS.

To enforce bonus by-law, should not be granted at instance of party to be benefited where he has been guilty of bribery.—See RAILWAYS AND R. W. Cos., 1.

MASTER AND SERVANT.

Agreement not to be performed in a year.—In an action on a verbal agreement made in November, for the hiring of plaintiff by defendant for a year from the 1st of December then next: *Held*, that there could be no recovery for wrongful dis-

missal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper v. Davies*, 442.

MEDICAL PRACTITIONER.

Medical Act of Ontario—R. S. O. ch. 142, sec. 42—Conviction—Distinction between "M.D." and "M. C. P. & S." as implying registration.—Where the defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fan-light containing the names of the registered practitioners, with the additions "M.D., M.C.P. & S., Ont.," and the name of the defendant with only the addition "M.D."

Held, that the use of the simple letters "M.D.," in contradistinction to the full titles of the partners of defendant appearing on the same fan-light, was not the use of a title "calculated to lead people to infer" registration, and that defendant therefore could not be convicted under sec. 42 of the Ontario Medical Act, R. S. O. ch. 142. *Regina v. Tefft*, 144.

MEMORANDA.

132, 324, 337, 471.

MORTGAGE.

Distress clause in.—See DISTRESS, 1-3.

By devisee, not a violation of restraint upon alienation of land.—See WILL.

MUNICIPAL CORPORATIONS.

1. *Transient traders—R. S. O. ch. 174, s. 466—Conviction.*—Where goods are consigned to be sold on commission, and they are sold in the shop or premises of the consignee, and by him or on his behalf, the owner of the goods or his manager is not an occupant of such premises, nor a transient trader within the Municipal Act (R. S. O. ch. 174 sec. 466, subsec. 53, as amended by 42 Vic. ch. 31, sec. 22), merely because he accompanies the goods and assists in their sale.

Held, also, that the validity of the by-law might be questioned on a motion to quash the conviction made under it. *Regina v. Cuthbert*, 19.

2. *Assessment for sewers—Statutes—Revised Statutes—Repeal—Construction.*—Sec. 464, sub-sec. 2, of 36 Vic. ch. 48, enacts that the Council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, &c., of any common sewer, &c., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," &c. This sub-sec. is amended, so far as the same relates to the City of Toronto, by 40 Vic. ch. 39, sec. 2, by inserting after the words "owners of such real property" the words, "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes." 40 Vic. ch. 6, respecting the Revised Statutes, passed in the same Session, repealed 36 Vic. ch. 48; and R. S. O. ch. 74, sec. 551, sub-sec. 2, corresponds with the repealed sec. 464, sub-sec. 2: *Held*, ARMOUR, J.,

doubting, and CAMERON, J., dissenting, 1. That under 40 Vic. ch. 6, sec. 10, the R. S. O., was substituted for the repealed Acts, and the amending Act applied to the R. S. O. ch. 174. 2. The amendment in 40 Vic. ch. 39, was a reference in a former Act remaining in force to an enactment repealed, and so a reference to the enactment in the revised statutes, corresponding to the sec. 464, sub-sec. 2, within sec. 11 of 40 Vic. ch. 6. 3. That the City of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor.

3. *Separation of townships—Arbitration—Municipal Loan Fund.*—*Held*, that the arbitrators on the separation of united townships, under R. S. O., ch. 174, sec. 28, should not take into consideration moneys received by the union, under 36 Vic. ch. 47, O., from the Government on account of the Municipal Loan Fund, and appropriated by the union to the purposes authorized by that Act; but that they might apportion any part of it remaining unappropriated, and in doing so need not be governed by the population of the several townships according to the census of 1871, as provided for the distribution by the Government under that Act.

The duty of such arbitrators is to ascertain the assets of the union, real and personal; dispose of the personal property as may be just; make proper allowance for the real estate to the township deprived of it by the separation, and for the personal property assigned to either municipality in excess of its share; and ascertain and apportion the liabilities. They should consider the value of

the real property of the union in each township as an asset, and what allowance, if any, should be made by the township retaining it under the statute to the separating township.—*In re the Corporation of the Township of Albemarle and the Corporation of the United Townships of Eastnor, Lindsay and St. Edmunds*, 133.

See LIMITATION OF ACTIONS, 1
—PUBLIC SCHOOLS, 1, 2—RAILWAYS
AND R. W. COS., 1—WATER AND
WATERCOURSES—WAYS, 1.

NEGLIGENCE.

Nonsuit upheld.—See RAILWAYS
AND RAILWAY COMPANIES, 3.

See BANKS,

NEW TRIAL.

1. *Promissory note—Defence of forgery—Expert evidence—New trial.*]
—An action against the endorser of promissory notes, who alleged that his endorsement had been forged, was tried twice. On the first trial the jury disagreed, and on the second they found for the plaintiff. No expert evidence was offered at either trial, though the defence intended was fully known. The Court refused a new trial, moved for on affidavits of an expert giving his opinion, founded on a comparison and critical analysis of the defendant's handwriting with the endorsements. *Moser v Snarr*, 428.

2. Where there were also common counts, on which there was evidence for the jury, but the verdict certainly included some damages upon the

special counts, a new trial was granted on the common counts, and a nonsuit as to the others. *Harper v. Davies*, 442.

Power of Court to make payment of costs by private prosecutor a condition of granting.—See CRIMINAL LAW.

Defendant in seduction not to be prejudiced in application for, because his counsel had examined him as to his means, after having endeavoured to exclude such evidence.—See SEDUCTION.

Refused under sec. 289, C.L.P.A.]
—See MALICIOUS PROSECUTION.

NOTICE.

Assignee of Chattel Mortgage without, takes subject to agreement between Mortgagor and Mortgagee.]
—See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

OCCUPANT.

Within R. S. O. ch. 174, sec. 466, sub-s. 53.—See MUNICIPAL CORPORATIONS, 1.

PLEADING.

See BANKRUPTCY AND INSOLVENCY, 3—CHOSE IN ACTION—CORPORATIONS—DEFAMATION—LIMITATION OF ACTIONS, 1.

PRACTICE.

Leave was granted, notwithstanding the lapse of two terms, to rehear a rule made absolute setting aside a

by-law, on no cause being shown. *Re Chamberlain and the Corporations of the United Counties of Stormont, Dundas, and Glengarry*, 26.

See ARBITRATION AND AWARD — COSTS, 2.

PRINCIPAL AND SURETY.

1. *Negligence of creditor—Discharge of surety.*—Defendants were maker and endorser of a promissory note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts.

On the maturity of the note plaintiffs handed it to D., who was their solicitor, for protest. D. did not protest or notify defendants of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the non-payment of the note.

In an action against defendants on the note they pleaded, on equitable grounds, the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that if compelled to pay the note, they would be defrauded out of the amount: *Held*, a good defence, and that the defendants were discharged. *Canadian Bank of Commerce v. Greene et al.*, 81.

2. *Bill of exchange—Principal and surety—Withholding facts from surety—Discharge of surety.*—The defendant agreed with plaintiff that he would become responsible for the price of such goods as P. should order of the plaintiff. P. sent a written order to the plaintiff, stating the number of articles he wished to pur-

chase, and naming the prices he would pay for some of them. The plaintiff shipped to P. a larger quantity of the goods than was specified in the order, and invoiced those as to which prices were specified at a higher price than mentioned in the order; and thereafter, without disclosing to defendant these facts, presented to him for signature a bill of exchange for the price of the goods shipped, representing to him that it was for the goods ordered. P. accepted the bill and kept the goods.

Held, that the defendant, being a surety, was entitled to be informed of the plaintiff's action in the premises, and that he was discharged from liability.

HAGARTY, C. J., diss. *Barber v. Morton*, 386. (This case stands for argument in Appeal.)

PROHIBITION.

See ATTACHMENT OF DEBTS.

PUBLIC SCHOOLS.

1. *High School districts—Power of County Council—Leave to rehear notwithstanding lapse of time—Practice.*—After the repeal of 37 Vic. ch. 27, sec. 38, O., by 40 Vic. ch. 16, sec. 18, sub-sec. 2, O., a County Council, having no power to determine the limits of high school districts, passed a by-law determining the same. By another by-law they repealed it, and established new limits. *Held*, that such last mentioned by-law was valid so far as it repealed the first by-law, which was invalid, but that the rest of it must be quashed. *Re Chamberlain and Corporation of the United Counties of Stormont, Dundas, and Glengarry*, 26.

2. *By-law dissolving a union of school sections—Petition for—Delay in moving.*—On application to quash a by-law dissolving a union school section, *Held*, that the council were not bound to go behind the assessment roll to ascertain whether the petition for such dissolution was signed by a majority of the assessed freeholders and householders, as required by sec. 140 of the Public Schools Act, R. S. O. ch. 204.

The petition was, that the section might be dissolved, "when," it was added, "a new section may be formed, and a few lots from sections 2, 7, and 8, might be annexed to equalize the area with other sections." *Held*, that this addition, being a mere suggestion, formed no objection.

The by-law provided that the dissolution should take effect "from and after," instead of on "the 1st January, 1880:" *Held*, no objection.

The by-law was passed on the 7th April, and this motion was not made until December following: *Seemle*, that this delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *In re McAlpine and the Corporation of the Township of Euphemia*, 199.

3. *High School districts—Separation of part—Liability to contribute—Money demanded before separation—Amendment.*—High School District No. 4 of the United Counties of Stormont, Dundas, and Glengarry, was, by by-law 551 of those counties, composed of the village of Morrisburg and the townships of Winchester and Williamsburg, in the county of Dundas. On the 29th April, 1878, the accommodation being insufficient, the board of education in Morrisburg resolved to levy \$7,000 on

the district, in order to erect a school house, and on the 19th July, 1878, the chairman, having been authorized by a resolution of the board, made a demand in writing, under his hand and the seal of the board, upon the townships to raise their proportions. On the 22nd June, 1878, the united counties, by by-law 590, repealed that portion of by-law 551 relating to the county of Dundas, and enacted that District No 4 should consist of Morrisburg only. In February, 1879, this by-law was quashed, but the rule was re-opened, and in February, 1880, it was finally quashed, except in so far as it repealed by-law 551. In June, 1879, the county council, by by-law, discontinued the existing high school districts in the county of Dundas.

Held, HAGARTY, C. J., dissenting, reversing the decision of Galt, J., that the municipalities of the townships of Winchester and Williamsburg were still liable to contribute their proportions of the sum demanded: that the legal rights of the board at the time of the demand must govern: that the by-law having been quashed was as if it had never existed; and that a mandamus should go.

Per HAGARTY, C. J.—Before the demand, the county council had, by by-law 590, professed to abolish the district; until it was quashed the municipalities were justified in refusing to comply with the demand; and even if the unquashed clause did not put an end to the district, no school house having been built, and the townships having been since legally withdrawn, the demand should not now be enforced.

There having been a misnomer in the names of the applicants, *per* ARMOUR and CAMERON, J.J., such misnomer not having been objected

to on the argument below might be amended. *Per* HAGARTY, C. J., in such a case no amendment should be granted as a matter of discretion. *In re High School Board of High School District Number Four of the United Counties of Stormont, Dardas, and Glengarry, and the Municipal Corporation of the Township of Winchester, in the County of Dundas, &c.*, 460.

RAILWAYS AND RAILWAY COMPANIES.

1. *By-law — Railway bonus—Bribery—Refusal of Council to pass by-law—Mandamus.*) — *Held*, that where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass the same because the passage of the by-law has been procured by bribery, and may set up such bribery in answer to an application for a mandamus.

Quere, whether it must be shewn, as it was here, that enough votes have been bribed to destroy the majority.

Semble, that a mandamus should not be granted at the instance of any railway company or person to be benefited by such by-law, where a single act of bribery or corruption has been brought home to the applicant. *In re Langdon and the Arthur Junction Railway Co., and the Corporation of the Township of Arthur*, 47.

2. *R. W.'s and R. W. Cos.—Deed by part owner of land—Infants' interest barred—31 Vic. ch. 68, D.*]—The mother of the infant children, resident with her, being entitled to a third undivided interest in the

land, they owning the residue, by deed agreed with a railway company, in consideration of an extension by them of their line of railway from R. to P. and for \$1, to grant to them in fee the right of way "through my land in P., consisting of such portion of lots 18 and 19 as may be required to carry the railway across said lots," and conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children: *Held*, that under the Railway Act of 1868, (31 Vic. ch. 68, sec. 9, sub-secs. 3, 9, D.,) her deed barred the children's interest in the land as well as her own, and that they were not therefore entitled to compensation from the company. *Dunlop v. The Canada Central Railway Company*, 74.

3. *Railway—Arbitration and award—Jurisdiction—Nullity.*] — The Court has no jurisdiction to set aside an award made under the Railway Act of 1868 (31 Vict. ch. 28, D.); but *Held*, that even were there jurisdiction the Court would not have interfered in this case, as the instrument in question was in no sense an award under the statute, the provisions of the statute not having been observed, there having been only two arbitrators appointed, who had not been sworn, and sub-sec. 26 of sec. 9, not having been complied with. *In re Horton and Admaston and Canada Central R. W. Co.*, 141.

4. *Railway Co.—Negligence—Nonsuit.*]—Plaintiff, while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal, which had been placed on the track. The only evidence given was, that certain servants of defendants had these fog signals in their possession for lawful

purposes, but that no one to the knowledge of several of the defendants' employees, who were called as witnesses for the plaintiff, placed this one on the track, and that it was wholly unnecessary for defendants' purposes; and it appeared not impossible that it might have been obtained from defendants' servants by some third party, or might have been put there by a servant of defendants for frolic.

Held, that a nonsuit was properly directed. *Jones v. Grand Trunk R. W. Co.*, 193.

5. *Railway companies—R. S. O. ch. 199.*—*Held*, that the defendants, a railway company, were not subject to the provisions of "The Ditches and Water Courses Act," R. S. O. ch. 199.—*Miller v. Grand Trunk Railway Co.*, 222.

6. *Grand Junction R. W. Co.—Grant of bonus to—Power of Dominion and Provincial Legislatures—Application for mandamus—Laches—Appointment of trustees.*—The Grand Junction R. W. Co. was incorporated by 16 Vic. ch. 43, and by 18 Vic. ch. 33, was united with the Grand Trunk R. W. Co. By an Act of the Dominion, in 1870, the G. T. R. having declined the construction of the Grand Junction road, it was enacted that all the corporate rights, &c., vested in the Grand Junction Co., by the 16 Vic., should be restored to and vested in certain persons named, who should exercise the same as fully as the parties originally named in the 16 Vic. could; and that the company should be called the Grand Junction R. W. Co. After this, in 1870, a by-law to aid the company by \$75,000 was introduced into the County Council of Peterborough, and approved of by

vote of the rate-payers, but on account of certain irregularities the Council refused to pass it. In 1871, by 34 Vic. ch. 48, the Legislature of Ontario made valid the by-law, and directed that the corporation should issue debentures as if the by-law had been proposed after said Act; and provided for the appointment of trustees to whom they should be delivered. In 1874, the same Legislature, reciting that the company had prayed to have all their Acts consolidated, enacted that all the rights, &c., intended to be vested in the company under the several Acts of the old Parliament of Canada, of the Dominion, and of Ontario, should be vested in the shareholders of the said company under the name of the Grand Junction R. W. Co., and that the 16 Vic. and 33 Vic. should be repealed. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under the Act of 1871. In 1872 the council served formal notice on the R. W. Co., repudiating all liability under the by-law. Work had been commenced in 1872, and in 1876 the time for completing the R. W. was extended by an Ontario statute till 1881, no time for such completion having been fixed by the by-law. No sum for interest or sinking fund had been collected, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees.

Held, that whether the Dominion Act of 1870 was *ultra vires* or not, the Ontario statute of 1874 either created a new corporation, or recognized and re-organized an existing body, which was entitled to the debentures, whether technically the

same company as that in existence when the by-law was made valid or not.

Per CAMERON, J., *Quære*, the work being wholly within the Province, whether the Dominion Parliament could create the company by the Act of 1870, without expressly declaring the work to be one "for the general advantage of Canada or of two or more of the Provinces," under the B. N. A. Act, sec. 92, sub-sec. 10.

Quære, also, whether that section relates only to public works to be undertaken at the public expense, or to works of a *quasi* private character, such as a railway to be constructed by a public company.

Quære, also, whether sub-sec. 11 of sec. 92 gives to the local Legislature power to create a corporation, as has been assumed, or only to make a general law under which corporations with provincial objects may be incorporated.

Held, also, that under the facts, there had been no laches on the part of the company disentitling them to the debentures.

The by-law provided that in the event of trustees being thereafter appointed by the Legislature for receiving the debentures, the warden, within six months after passing the by-law, should deliver the debentures to them. By the Act of 1871, whenever any municipality should grant a bonus to the company, the debentures might, at the option of the municipality, be delivered to three trustees, to be named as therein directed. *Per* HAGARTY, C. J., and ARMOUR, J., the debentures should be delivered to the trustees appointed under the statute. *Per* CAMERON, J., the Legislature had not appointed trustees within the mean-

ing of the by-law, but had only provided the manner in which they might be appointed; and as there was under the terms of the by-law no default in delivering the debentures, there should be no mandamus. *Re Grand Junction Railway Co. and County of Peterborough*, 302. (This case has since been argued in Appeal and stands for judgment.)

RECOGNIZANCE.

Irregularity.] — A recognizance taken before a police magistrate under 32-33 Vic. ch. 30, sec. 44, D., Form Q. 2 (Schedule), omitted the words "to owe": *Held*, fatal, and that an action would not lie upon the instrument as a recognizance. *Regina v. Hoodless*, 556.

REGULÆ GENERALES.

354, 472.

ROAD COMPANIES.

Application of "General Road Companies Act" (R. S. O. ch. 152).] — *See* WAYS, 2.

SCHOOLS.

See PUBLIC SCHOOLS.

SEDUCTION.

Seduction—Evidence of defendant's means—New trial.] — *Held*, following *Hodsoll v. Taylor*, L. R. 9 Q. B. 79, that in an action for seduction evidence as to defendant's means is inadmissible; and that evidence of the kind having been received, defendant was not to be prejudiced in

his application for a new trial because his counsel had, after having done his best to exclude the evidence, examined defendant on the same subject with a view to disproving the estimate placed on his means. *Ferguson v. Veitch*, 160.

SET-OFF.

See BANKRUPTCY AND INSOLVENCY, 1.

SHIPPING.

Mortgage of vessel — Fixtures — Trover by mortgagee.]—Plaintiff was mortgagee of 64 shares in a vessel belonging to defendant, and on the defendant's insolvency was allowed by the creditors and the assignee to take her as she stood at a valuation. Defendant had previously removed from the vessel a piano and several other articles, and had substituted stoves for steam heaters.

Held, that in the absence of fraud, the plaintiff was concluded by the settlement with the assignee by which he took the vessel as she then stood, and could not recover these articles; and that the mortgagor, being in possession, was entitled to manage the vessel as he thought best, and to remove such articles upon his substituting others for them.

Semle, that a piano on board of a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances." *St. John v. Bullivant*, 614.

SLANDER.

See DEFAMATION.

STATUTES, CONSTRUCTION OF.

Imp. Act, 21 Geo. III., ch. 49.]—See SUNDAY.

C. S. U. C. ch. 88, sec. 3.]—See DEED, (Proof of.)

31 Vic. ch. 28, D.]—See RAILWAYS AND RAILWAY COMPANIES, 3.

31 Vic. ch. 68, D.]—See RAILWAYS AND RAILWAY COMPANIES, 2.

35 Vic. ch. 16, (O.)]—See HUSBAND AND WIFE, 1.

40 Vic. ch. 6, sec. 10, O.]—See MUNICIPAL CORPORATIONS, 2.

40 Vic. ch. 39, O.]—See MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 62, sec. 28.]—See MALICIOUS ARREST.

R. S. O. ch. 51, sec. 71.]—See COSTS, 2.

R. S. O. ch. 66, sec. 39.]—See HUSBAND AND WIFE, 2.

R. S. O. ch. 108.]—See LIMITATION OF ACTIONS, 2.

B. S. O. ch. 118.]—See BANKRUPTCY AND INSOLVENCY, 4.

R. S. O. ch. 142, sec. 42.]—See MEDICAL PRACTITIONER.

R. S. O. ch. 152.]—See WAYS, 2.

R. S. O. ch. 174, sec. 28.]—See MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 174, sec. 466, sub-sec. 53.]—See MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 174, sec. 491.]—See LIMITATION OF ACTIONS, 1.

R. S. O. ch. 174, sec. 53.]—See WATER AND WATERCOURSES.

R. S. O. ch. 181, sec. 51.]—See TAVERNS AND SHOPS, 1.

R. S. O. ch. 199.]—See RAILWAYS AND RAILWAY COMPANIES, 5.

STATUTE OF FRAUDS.

Agreement not to be performed within a year.]—See MASTER AND SERVANT.

SUNDAY.

Profanation of the Lord's Day—Illegality of Sunday concerts—Imp. Act 21 Geo. III. ch. 49.]—The Imp. Act 21 Geo. III. ch. 49, prohibiting amusements and entertainments on the Lord's Day, is in force in Ontario, and an application to quash a conviction thereunder for keeping a disorderly house known as the "Royal Opera House," opened and used for public entertainment and amusement on the Lord's Day, was therefore refused. *Regina v. Barnes*, 276.

SURETY.

See PRINCIPAL AND SURETY.

TAVERNS AND SHOPS.

1. *Liquor License Act—R.S.O. ch. 181—Conviction for a third offence.*]—On motion to quash a conviction by a Justice of the Peace, which had been appealed to the County Judge, an objection that the writ of *certiorari* was improperly directed to, and and returned by, the Clerk of the Peace and County Attorney, instead of the County Judge or magistrate, was overruled.

Sec. 51 of the Liquor License Act, R. S. O. ch. 181, which imposes the penalties, omits all reference to a third offence, (which was provided for in the enactments of which it is a consolidation,) though such an offence is referred to in sec. 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction for a third offence was therefore quashed, although the penalty imposed thereby might have been inflicted on a second offence.—*Regina v. Frawley*, 227.

2. *Selling liquor without license—Liability of servant—R. S. O. ch. 181—Power of Provincial Legislature.*]—The defendant, a servant of one Ward, the keeper of an unlicensed tavern, was convicted of selling liquor in her master's absence.

CAMERON, J., held the conviction good, the case being undistinguishable in principle from *Regina v. Williams*, 42 U. C. R. 462, though he would otherwise have held the master alone responsible, under "The Liquor License Act," R. S. O. ch. 181.

Quære, per Cameron, J., as to the power of the Local Legislature to limit or authorize municipalities to limit the number of licenses; and as to the effect of the decision of the Supreme Court in *City of Fredericton v. The Queen*, 3 Sup. Ct. 505.—*Regina v. Howard*, 346.

See INSURANCE. 1.

TITLE.

See RAILWAYS AND R. W. COS., 2.

TITLE TO LAND.

See JUSTICE OF PEACE, 1.

TOLLS.

See WAYS, 2.

TRANSIENT TRADER.

See MUNICIPAL CORPORATIONS, 1.

TROVER.

See SHIPPING.

WAIVER.

See INSURANCE, 3, 4.

WATER AND WATER-COURSES.

Drainage by-law—Publication of by-law—Appeal to Court of Revision and County Judge—Assessment of property—Interest of member of Council.] — The omission of the words, "during the term next ensuing the final passing of the by-law," from the notice with regard to a drainage by-law, under R. S. O., ch. 174, sec. 531, does not render the by-law invalid.

Where a by-law finally passed differs from that published only in respect of changes made in the assessment by the Court of Revision and County Judge, it is not necessary to publish such by-law again after such changes.

Where the engineer who made the assessment was not notified, and was not present at the Court of Revision, but was present on the appeals therefrom to the County Judge, which were taken by all who appealed to the Court of Revision, *Held*, no ground for setting aside the by-law.

The engineer is the proper party to make the assessment.

The principal on which the assessments were made, of assessing against a whole lot or a part of a lot owned by one person, when only some of its acreage was benefited, the value of such benefit, *Held*, not erroneous; and this would at all events have formed no ground for quashing the by-law, as this was a matter of which complaint might have been made to the Court of Revision.

It was alleged that one member of the Council was largely interested in the property to be drained by the by-law; but, *Held*, that no interest, which springs solely from his being a ratepayer, can disqualify a councillor or a member of a Court of Revision from performing his duties as such.

On appeal to the County Judge he reduced the assessment on one lot by only half, the owner, F., consenting, although according to the evidence it should have been further reduced. In distributing the amounts struck off among the other properties assessed he added nothing to the assessment of this lot, so fixed by consent, but he certified that the other owners were assessed for less than they would have been but for F.'s consent: *Held*, that sub-sec. 13, of sec. 530, had been practically complied with. *Re McLean and Corporation of the Township of Ops*, 325.

See RAILWAYS AND RAILWAY COMPANIES, 2.

WAYS.

1. *Municipal corporations—By-law to close road—Insufficiency of notice—Application to quash.*]—*Held*, that the notice of intention to pass a by-law to close a road should state the day on which the municipal council intend considering the by-law.

Semble, that the mere fact of the relator having knowledge *aliunde* was not a sufficient answer to an application by him to quash for want of a proper notice of the day on which the by-law was to be considered. *In re Birdsall and Farrar and the Corporation of the Township of Asphodel*, 149.

2. *Road Co.'s Act* (R. S. O. ch. 152)—*Roads complete and tolls established—Extensions—Right to collect tolls.*—The provisions of the "General Road Companies' Act" (R. S. O. ch. 152), respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon.

In this case the extensions were new constructions within the city of Hamilton, and, measured separately, were less than two miles, though the distance of the original road and the extensions together much exceeded two miles: *Held*, that the defendants were entitled to exact tolls therefor.

The toll gate had been maintained for nearly nine years on the portions of the road within the city of Hamilton: *Held*, that this did not preclude defendants from erecting a gate and taking toll there *Knott v. The Hamilton and Flamborough Road Company*, 338.

WILL.

Ejectment—Restraint upon alienation.—A direction in a devise in

fee simple that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper:" *Held*, a valid restraint upon alienation.

Held, also, that the giving of a mortgage by the devisee was not a violation of the restraint. *Smith v. Faught et al.*, 484.

WORDS.

"Transient Trader."—*See MUNICIPAL CORPORATIONS*, 1.

"In Bond."—*See BILLS OF SALE AND CHATTEL MORTGAGES*, 1.

"Grocery."—*See INSURANCE*, 1.

"On demand."—*See BILLS AND NOTES*, 2.

"JUDGE."—*See DIVISION COURT.*

ERRATA.

In *Barr v. Doan*, at p. 491, before "unwarranted," last word of *headnote*, insert *not*.

In *Trust and Loan Co. v. Lawrason*, at p. 179, after "Leith, Q.C.," add, *and A. J. Wilkes*.

